

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 469.

THE UNITED STATES OF AMERICA, THE INTERSTATE
COMMERCE COMMISSION, NATIONAL COUNCIL OF
TRAVELING SALESMEN'S ASSOCIATIONS ET AL., AP-
PELLANTS,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, AT-
LANTIC CITY RAILROAD COMPANY, ATLANTIC & ST.
LAWRENCE RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MASSACHUSETTS.

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1-3 District Court of the United States for the District of Massachusetts.

THE NEW YORK CENTRAL RAILROAD COMPANY; ATLANTIC City Railroad Company; Atlantic & St. Lawrence Railroad Company; Baltimore, Chesapeake & Atlantic Railway Company; Bangor & Aroostook Railroad Company; Boston & Maine Railroad; Buffalo, Rochester & Pittsburgh Railway Company; Central New England Railway Company; The Central Railroad Company of New Jersey; Central Vermont Railway Company; The Chicago & Erie Railroad Company; The Chesapeake & Ohio Railway Company; Chicago, Detroit & Canada Grand Trunk Junction Railroad Company; The Cincinnati, Indianapolis & Western Railroad Company; The Cincinnati Northern Railroad Company; The Cincinnati, Lebanon & Northern Railway Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; The Delaware & Hudson Company; The Delaware, Lackawanna & Western Railroad Company; Detroit, Grand Haven & Milwaukee Railway Company; Detroit & Toledo Shore Line Railroad Company; Erie Railroad Company; Grand Rapids & Indiana Railway Company; Grand Trunk Western Railway Company; The Lake Erie & Western Railroad Company; Lehigh Valley Railroad Company; The Long Island Railroad Company; Maine Central Railroad Company; Maryland, Delaware & Virginia Railway Company; The Michigan Central Railroad Company; The Monongahela Railway Company; New Jersey & New York Railroad Company; The New York, Chicago & St. Louis Railroad Company; New York Connecting Railroad Company; The New York, New Haven & Hartford Railroad Company; New York, Ontario & Western Railway Company; New York, Susquehanna & Western Railroad Company; The Pennsylvania Railroad Company; The Philadelphia & Reading Railway Company; The Pittsburgh & Lake Erie Railroad Company; The Pittsburg, Shawmut & Northern Railroad Company, and Henry S. Hastings, receiver; Port Reading Railroad Company; Richmond, Fredericksburg & Potomac Railroad Company; The Rutland Railroad Company; Toledo, St. Louis & Western Railroad Company; West Jersey & Seashore Railroad Company; Western Maryland Railway Company; and the Wheeling & Lake Erie Railway Company, petitioners,

against

THE UNITED STATES OF AMERICA, RESPONDENT.

In Equity.
No. 1808.

Filed March 30, 1923.

*To the Honorable Judges of the District Court of the United States
for the District of Massachusetts:*

The New York Central Railroad Company, a corporation of the States of New York, Pennsylvania, Ohio, Indiana, Michigan, and Illinois; Atlantic City Railroad Company, a corporation of the State of New Jersey; Atlantic & St. Lawrence Railroad Company, a corporation of the States of Maine, New Hampshire, and Vermont; Baltimore, Chesapeake & Atlantic Railway Company, a corporation of the State of Maryland; Bangor & Aroostook Railroad Company, a corporation of the State of Maine; Boston & Maine Railroad, a corporation of the States of New Hampshire, Massachusetts, New York, and Maine; Buffalo, Rochester & Pittsburgh Railway Company, a corporation of the States of New York and Pennsylvania; Central New England Railway Company, a corporation of the State of New York; Central Vermont Railway Company, a corporation of the State of Vermont; The Central Railroad Company of New Jersey, a corporation of the State of New Jersey; The Chesapeake & Ohio Railway Company, a corporation of the State of Virginia; Chicago & Erie Railroad Company, a corporation of the State of Indiana; Chicago, Detroit & Canada Grand Trunk Junction Railroad Company, a corporation of the State of Michigan; The Cincinnati, Lebanon & Northern Railway Company, a corporation of the State of Ohio; The Cincinnati, Indianapolis & Western Railroad Company, a corporation of the State of Indiana; The Cincinnati Northern Railroad Company, a corporation of the State of Ohio; The
5 Cleveland, Cincinnati, Chicago & St. Louis Railway Company, a corporation of the States of Ohio and Indiana; The Delaware & Hudson Company, a corporation of the State of New York; The Delaware, Lackawanna & Western Railroad Company, a corporation of the State of Pennsylvania; Detroit, Grand Haven & Milwaukee Railway Company, a corporation of the State of Michigan; Detroit & Toledo Shore Line Railroad Company, a corporation of the State of Michigan; Erie Railroad Company, a corporation of the State of New York; Grand Rapids & Indiana Railway Company, a corporation of the States of Michigan and Indiana; Grand Trunk Western Railway Company, a corporation of the States of Indiana and Michigan; The Lake Erie & Western Railroad Company, a corporation of the State of Ohio; Lehigh Valley Railroad Company, a corporation of the State of Pennsylvania; The Long Island Railroad Company, a corporation of the State of New York; Maryland, Delaware & Virginia Railway Company, a corporation of the States of Maryland and Delaware; Maine Central Railroad Company, a corporation of the State of Maine; The Michigan Central Railroad Company, a corporation of the State of Michigan; The Monongahela Railway Company, a corporation of the State of Pennsylvania; New Jersey & New York Railroad Company, a corporation of the States

of New York and New Jersey; The New York Connecting Railroad Company, a corporation of the State of New York; The New York, Chicago & St. Louis Railroad Company, a corporation of the States of New York, Pennsylvania, Ohio, and Indiana; The New York, New Haven & Hartford Railroad Company, a corporation of the States of Connecticut, Rhode Island, and Massachusetts; New York Ontario & Western Railway Company, a corporation of the State of New York; New York, Susquehanna & Western Railroad Company, a corporation of the States of New Jersey and Pennsylvania; The Pennsylvania Railroad Company, a corporation of the State of Pennsylvania; The Philadelphia & Reading Railway Company, a corporation of the State of Pennsylvania; The Pittsburgh & Lake Erie Railroad Company, a corporation of the State of Pennsylvania; The Pittsburgh, Shawmut & Northern Railroad Company, and Henry S. Hastings, receiver, a corporation of the States of New York and Pennsylvania; Port Reading Railroad Company, a corporation of the State of New Jersey; Richmond, Fredericksburg & Potomac Railroad Company, a corporation of the State of Virginia; The Rutland Railroad Company, a corporation of the States of New York and Vermont; Toledo, St. Louis & Western Railroad Company, a corporation of the State of Indiana; West Jersey & Seashore Railroad Company, a corporation of the State of New Jersey; Western Maryland Railway Company, a corporation of the States of Maryland and Pennsylvania; and the Wheeling & Lake Erie Railway Company, a corporation of the State of Ohio, bring this their petition against the United States of America, and hereby sue to enjoin, set aside, suspend, and annul an order of the Interstate Commerce Commission, a commission existing by virtue of an act of Congress of February 4, 1887, entitled "An act to regulate commerce," and the acts amendatory thereof and supplemental thereto, and thereupon your petitioners complain and say:

I.

7 Since March 1, 1920, your petitioners have been and now are common carriers engaged in the business of operating steam railroads located in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, Ohio, Illinois, Indiana, Michigan, West Virginia, and in the Dominion of Canada, and have been and now are subject to the provisions of the interstate commerce act in so far as the same are constitutional. All of your petitioners are members of the Eastern group as established by the commission in Increased Rates, 1920, pursuant to the provisions of section 15a of the interstate commerce act. For many years prior to December 28, 1917, at which time the President of the United States took possession and assumed control of the railroads of your petitioners, petitioners or their predecessors were engaged in the business of operating the aforesaid steam railroads and engaged in interstate commerce.

II.

This suit is brought to enjoin, set aside, suspend, and annul an order of the Interstate Commerce Commission and is instituted under the provisions of the interstate commerce act and of the act of October 22, 1913, entitled "An act making appropriations to supply urgent deficiencies in appropriations for the fiscal year nineteen hundred and thirteen and for other purposes," and also under the general equity jurisdiction of this court.

III.

The Boston & Maine Railroad is a corporation of the States of New Hampshire, New York, Massachusetts, and Maine, having its principal operating office in the District of Massachusetts, and the matter complained of under the order of the Interstate Commerce Commission of March 6, 1923, hereinafter referred to, arises in said District of Massachusetts.

IV.

Section 22 of the interstate commerce act was amended by an act of Congress of August 18, 1922, so as to number the then existing section as paragraph 1 and to add two paragraphs which directed the Interstate Commerce Commission to require each carrier by railroad subject to the act to issue interchangeable scrip coupon or mileage books at just and reasonable rates under rules and regulations, and with exemptions to be prescribed by the commission. For convenience section 22 as amended is printed in full, marked Exhibit A, and made a part hereof.

V.

Pursuant to the provisions of section 22, the commission on August 23, 1922, issued an order providing for an investigation, a copy of which order is printed in full, marked Exhibit B, and made a part hereof.

VI.

Pursuant to the provisions of the order dated August 23, 1922, a hearing was had before the commission on September 26 and 27, 1922, at which hearing the carriers made appropriate reservations of their legal and constitutional rights to contest any order which the commission might make in this matter, and thereafter proceeded to introduce testimony in response to the questions propounded in said order of August 23, 1922, of the commission. Certain organizations, including organizations of commercial travelers, also introduced testimony in response to said questions, and thereafter the matter was argued before the commission on November 15, 1922, and thereafter on January 26, 1923, the commission made its report

and rendered its opinion, a copy of which, together with dissenting opinions and appendices are printed in full, marked Exhibit C, and made a part hereof. Said report and opinion after summarizing the evidence and making various findings of fact made the following concluding finding:

"We find and conclude that on and after March 15, 1923, carriers by rail, respondents herein, enumerated in Appendix C, shall establish, issue, and maintain, at such offices as we may hereafter designate, a nontransferable interchangeable scrip coupon ticket in the denomination of \$90, which shall be sold at a reduction of 20 per cent from the face value of the ticket. We further find that the rates resulting from that reduction will be just and reasonable for this class of travel."

VII.

Thereafter, on March 6, 1923, the commission issued a supplemental report, with appendix, and order, which are printed in full, marked Exhibit D, and made a part hereof.

VIII.

The said order of March 6, 1923, requires each steam railroad carrier having operating revenues, whether derived from freight, passenger, or other traffic, of \$1,000,000 per annum, or in excess thereof, to issue at all principal stations on its lines a ticket containing 1,800 coupons each having a face value of 5 cents, receivable for transportation at the value of 5 cents per coupon, or \$90 for the entire ticket by each Class I carrier in each and every passenger-carrying train operated by it, but not receivable for excess fares, commutation fares, Pullman surcharge, or excursion fares. Each Class I carrier is required to issue and sell this ticket, although no part of the transportation provided for by the ticket may be conducted by the issuing carrier, and each Class I carrier is required to honor the ticket for transportation at its face value, although the ticket has not been sold by it. The ticket is to be sold for \$72, a discount of \$18, or 20 per cent from the face value of the coupons contained therein. The ticket is to bear the photograph and signature of the purchaser and is to be good for transportation for a period of one year from the date of issuance. If the coupons are not entirely used within the year the remaining coupons are redeemable by the issuing carrier on the basis of charging the full standard fare or fares for the coupons used and refunding the difference, if any, between such standard fare or fares and the price of \$72, paid for the ticket.

IX.

Prior to the promulgation of the aforesaid order of March 6, 1923 the commission in a proceeding pending before it, known as In-

creased Rates, 1920, and in pursuance of the duties imposed upon it by section 15a of the interstate commerce act requiring it to initiate and establish rates and fares which would enable the carriers in such groups as the commission might designate to earn a fair return on the aggregate value of their railway property held for and
 11 used in the service of transportation, had established as the just and reasonable rate for the transportation of passengers over the lines of your petitioners and other carriers the rate of 3.6 cents per mile, which rate of fare accordingly became the established just and reasonable rate for this service.

Thereafter, in Reduced Rates, 1922, the commission reaffirmed this finding so that the established just and reasonable rate of your petitioners and other carriers to which said order of March 6, 1923, is addressed, in effect immediately prior to the issuance of said order of March 6, 1923, was 3.6 cents per mile, and this just and reasonable rate of fare has continued at this figure of 3.6 cents ever since the effective date of the decision of the commission in Increased Rates, 1920, and still continues in effect as the established just and reasonable rate.

The aforesaid order of the commission of March 6, 1923, which requires your petitioners and other carriers to issue scrip coupon tickets at a reduction of 20 per cent below the face value thereof, operates to require your petitioners and other carriers to transport over their lines persons who purchase such scrip coupon tickets at a rate per mile of 2.88 cents irrespective of the commission's finding as to the just and reasonable rate of fare for the transportation of passengers over the lines of railroad of your petitioners and other carriers.

X.

The aforesaid order of the commission of March 6, 1923, is unlawful and void in that it is not supported by the findings of fact made by the commission in its report and supplemental report. The
 12 commission found that there will be large additional expenses in selling and accounting and in the issuance and administration of scrip coupon tickets, thereby increasing the cost of transportation of holders of such tickets as compared with holders of standard fare tickets. The commission further found that it was wholly speculative whether there would be any substantial increase in the volume of business resulting from the issuance of such tickets at reduced fares to compensate the carriers for the large reduction in net railway operating income caused by the sale of such tickets. The additional expense of selling the aforesaid tickets and accounting involved in properly distributing the revenue earned thereon and in properly protecting the nontransferable character of the ticket will amount annually to a large sum of money, estimated by the carriers at the hearing before the commission at approximately \$1,600,000 per annum, which estimate was not dissented from by

the commission. The commission further found that the operating ratio of passenger traffic during the year 1921 was 85.24 per cent and on freight traffic 81.75 per cent. The commission further found that the return to Class I carriers, including large terminal and switching companies, to which class of carriers the aforesaid order of March 6, 1923, is limited, was for seven months ended July 31, 1922, for the Eastern group 4.76, for the Southern group 5.04 per cent, for the Western and Mountain-Pacific groups 3.70 per cent, and for the United States as a whole 4.36 per cent on the valuation established by the commission in Increased Rates, 1920, and reaffirmed in Reduced Rates, 1922.

None of the findings of fact made by the commission supports the formal finding and conclusion that, even for the experimental period of at least one year referred to in the report of the commission, a reduction of 20 per cent to purchasers of scrip coupon tickets would result in just and reasonable passenger fares, and most, if not all, of said findings strongly negative such conclusion.

XI.

The aforesaid order of the commission of March 6, 1923, is unlawful and void in that it requires the carriers to perform services at rates which are noncompensatory. The commission as stated above found that for the year 1921 the passenger operating ratio of the Class I roads was 85.24. If the revenue of the roads on any part of their passenger business should be reduced by 20 per cent, the result would be that on that part of such business they would receive only 80 per cent of the gross revenue which they received thereon in 1921. As stated above, the commission has found that there would be large additional expenses involved in business conducted in connection with scrip coupon tickets on account of the selling, accounting for, and safeguarding thereof. Passengers using such tickets will travel on the same trains and between the same stations and will receive the same service in every respect as passengers using standard tickets. The cost of service for these passengers will therefore be greater than that for other passengers to the extent that it is increased by the additional cost involved in the administration of these tickets.

The commission has further found, as stated above, that there is no evidence to show that travel will be sufficiently stimulated by the sale of these tickets to decrease the cost of service to any substantial extent. The result will be that passengers using these tickets will cost the railroads more than other passengers and will pay 20 per cent less. It is apparent, therefore, that on the basis of a passenger operating ratio of 85 or more, or even 80, the service rendered to holders of such tickets will be rendered at an actual out-of-pocket loss to the railroads. The aforesaid order is therefore unlawful and void in that it deprives the railroads of their property without due process of law and takes their property for

public use without just compensation in violation of the fifth amendment to the Constitution.

XII.

The aforesaid order of the commission of March 6, 1923, is unlawful and void in violation of section 2 of the interstate commerce act in that it provides for a special rate or rebate whereby the carrier is to charge, demand, collect, and receive from one person a less and different compensation for a service rendered or to be rendered in the transportation of passengers than it charges, demands, collects, and receives from other persons for doing for them a like and contemporaneous service in the transportation of passengers under substantially similar circumstances and conditions. On the facts as found by the commission the physical conditions of transportation of the holder of a scrip coupon ticket on the ordinary interstate trains are precisely the same as the physical conditions of transportation of a person holding a standard fare ticket on the same train, except that where the scrip coupon ticket is tendered for transportation on the train more time and trouble devolves upon the conductor or ticket collector in receiving and accounting for such transportation than devolves upon him in connection with the receipt and accounting for passengers holding the standard fare ticket.

XIII.

The aforesaid order of the commission of March 6, 1923, is unlawful and void in that it requires the carriers to violate section 3 of the interstate commerce act which makes it unlawful for any common carrier subject to the act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality or to any particular description of traffic. On the facts as found by the commission, to transport the holder of a standard fare ticket on the ordinary trains at one rate of fare while transporting the holder of a scrip coupon ticket on the same or similar trains at a rate of fare 20 per cent lower is to create an undue preference in favor of the holder of such scrip coupon ticket.

XIV.

The aforesaid order of the commission of March 6, 1923, is unlawful and void in that the commission based its said order on the mistaken view that the amendment to section 22 required that interchangeable mileage books or scrip coupon tickets provided for should be issued at a reduction in the rate regardless of the evidence which might be adduced at the hearing. That the commission so construed the act of Congress appears from the following quotation from the report of the commission:

16 "The spirit and the apparent theory of the law is that carriers shall be required to sell such ticket at something less

than the standard fare, which would be just and reasonable because it would be sold in such quantities as to stimulate travel, and thereby increase net revenue or at least offset any loss in revenue that might result from the reduction, in which event carriers would render greater service to the public."

In making the formal finding that a fare of 20 per cent less than the standard fare would be just and reasonable for the holders of scrip coupon tickets, the commission disregarded the findings of fact made by it and adopted an erroneous construction of the amendment to section 22 of the interstate commerce act and the order issued by it on March 6, 1923, is therefore unlawful and void.

XV.

If, however, the commission correctly construed the aforesaid amendment to section 22 as requiring the issuance of scrip coupon tickets at reduced fares, said amendment is unconstitutional and void in that it is not a proper regulation of interstate commerce and is therefore in violation of Article I, section 8, of the Constitution of the United States, and is in substance an arbitrary discrimination which takes property of the carriers without just compensation and without due process of law in violation of the fifth amendment to the Constitution of the United States. If the aforesaid order of March 6, 1923, is authorized by the amendment to section 22, the result is that the amendment and the aforesaid order require the

17 carriers to discriminate in favor of such persons as contemplate 2,500 miles of travel in one year and are in a position to pay \$72 in advance for such transportation. These persons would secure the same service on the same trains and with the same privileges as the large majority of the traveling public who do not contemplate traveling 2,500 miles in one year or are not in a position to advance \$72 for such transportation. Such a discrimination, if required by the amendment to section 22, is beyond the power of Congress under the provisions of Article I, section 8, of the Constitution.

XVI.

The aforesaid order of the commission of March 6, 1923, is unlawful and void because, as appears from the opinion and report of the commission, the petitioners are required without regard to the justness and reasonableness of the fares and without regard to the consideration of a fair return on the value of their property held for and used in the service of transportation, to try for a period of at least one year an experiment for the purpose of determining whether or not the reduction in fare prescribed by the commission would be reasonable. The proposed experiment is arbitrary and unreasonable for the reason that it can determine nothing except the number of persons in the United States who travel 2,500 miles per annum and have \$72 to pay for such travel in advance. It can not determine

whether such persons would or would not have traveled to this extent if the scrip coupon ticket at the reduced fare had not been available. The order is arbitrary and was made without observance of due process of law and in violation of the fifth amendment to the Constitution.

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XVII.

The aforesaid order of the commission of March 6, 1923, is unlawful and void in violation of section 15a of the interstate commerce act, which requires the commission to initiate, modify, establish, and adjust rates so that the carriers as a whole or in each of such rate groups as the commission may from time to time prescribe, will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way and structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.

Pursuant to section 15a the commission in Increased Rates, 1920, divided the railroads of the United States into four groups, the Eastern, the Southern, the Western, and the Mountain-Pacific, fixed the tentative valuation of the Eastern group at \$8,800,000,000, and in Reduced Rates, 1922, the rate of return at 5.75 per cent, and reaffirmed the valuation previously established, plus the net cost of additions and betterments made the carriers since the time of fixing of said valuation.

Under the rates and fares prescribed by the commission and in effect at the time the aforesaid investigation was conducted and at the time the aforesaid order of March 6, 1923, was issued, the carriers in the Eastern group were not earning 5.75 per cent on said valuation and were, in fact, as petitioners are informed and believe and therefore allege, earning approximately 4 per cent on said valuation. The

findings of the commission contained in the aforesaid report show that for the seven months ended July 31, 1922, the Class

I carriers, including large terminal and switching companies in the Eastern group, received net railway operating income of 4.76 per cent.

At the hearing in the aforesaid proceedings the carriers of the United States estimated that the scrip coupon ticket of the character ordered by the commission would reduce their net railway operating income on the existing volume of business approximately \$60,000,000 per annum, or approximately 6 per cent of their total passenger revenue. This estimate was not questioned by the commission in its findings. The passenger revenues of the carriers of the Eastern group for the year ended December 31, 1922, were approximately \$515,000,000, of which 6 per cent is upwards of \$30,000,000, representing a loss of that amount in net railway operating income to the carriers of the Eastern group of which your petitioners are members, assuming no substantial increase in the volume of busi-

ness. The passenger revenues of your petitioners for the year ended December 31, 1922, were approximately \$480,000,000, of which 6 per cent is approximately \$28,800,000, representing a loss of that amount in net railway operating income to the petitioners assuming no substantial increase in the volume of business.

The commission, in requiring such large reductions in net railway operating income at a time when the carriers were not and are not earning the rate of return prescribed on the valuation established by the commission, disregarded the provisions of the interstate commerce act requiring it to establish such rates that the carriers

20 of the Eastern group would earn an aggregate annual net railway operating income equal as nearly as may be to 5.75 per cent upon the aforesaid aggregate value of the railway property of such carriers held for and used in the service of transportation, and acted beyond the scope of power delegated to it by said act.

XVIII.

The aforesaid order of the commission of March 6, 1923, is unlawful and void in that it requires the carriers to violate section 1 of the interstate commerce act, which requires the carriers to establish and charge just and reasonable fares and the aforesaid order of March 6, 1923, is in violation of section 22, which requires the commission to prescribe just and reasonable fares in connection with the issuance and sale of scrip coupon tickets. By its decision in Increased Rates, 1920, the commission established the basic rate of fare of 3.6 cents per mile as the just and reasonable basic rate of fare generally throughout the United States. Subsequently it made many orders involving intrastate fares in numerous States requiring such fares to be established on the basis of 3.6 cents per mile in order that interstate commerce might not be unduly burdened or subjected to unjust discrimination, which orders are still in effect. Still later in Reduced Rates, 1922, the commission reaffirmed its previous decision as to the reasonableness of the basic fare of 3.6 cents per mile. In the opinion heretofore referred to and made a part hereof, the commission did not question the justness and reasonableness of the basic fare of 3.6 cents per mile. The actual cost of transportation of passengers using such tickets is no less than the cost of transportation of passengers using such tickets at the standard

21 rate, and the cost of issuing, safeguarding, and accounting for such scrip coupon tickets is greater than the cost incident to the use of standard form of ticket. There is and will be no saving to the petitioners in the use of such scrip coupon tickets on any principle of wholesale rates because the service performed is identical and the cost thereof is greater to the carriers. On the facts as found by the commission a just and reasonable fare for the holder of a scrip coupon ticket good for ordinary transportation on all trains throughout the United States cannot possibly be less than a just and reason-

able fare for the transportation of any other passenger receiving the same service.

XIX.

The aforesaid order of the commission of March 6, 1923, is unlawful and void in that it interferes with the liberty of contract of the carriers and takes their property without due process of law and without just compensation in violation of the fifth amendment to the Constitution in that it requires the establishment of relation of principal and agent and creditor and debtor, between carriers without their consent and requires one carrier to furnish transportation upon the credit of another carrier, and may in cases of insolvency of the carrier issuing the scrip coupon tickets subject the carriers required to honor the scrip coupon tickets so issued to substantial loss. It also requires the carriers issuing scrip coupon tickets over whose lines no part of the transportation is used to perform substantial accounting and other services without compensation therefor in violation of the fifth amendment to the Constitution.

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XX.

The aforesaid order of the commission of March 6, 1923, is unlawful and void because it requires a carrier to accept scrip coupon tickets issued by itself or another carrier in payment for a single journey irrespective of the length of that journey and irrespective of the fact that the holder of the scrip coupon ticket may use the scrip coupon ticket for no other journey over the line of the carrier in question. The order is therefore arbitrary and void in violation of the fifth amendment to the Constitution of the United States, since, without any reason or justification whatever, it requires the carrier to transport the said passenger on the said journey for less than the just and reasonable rate of fare as determined by the Interstate Commerce Commission in the proceedings hereinabove referred to.

XXI.

Paragraph 2 of section 22 of the interstate commerce act also provides in part that "the commission may in its discretion exempt from the provisions of this amendatory act either in whole or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made."

No rule or standard to guide the discretion of the commission in the exercise of this power is prescribed. Legislative power is delegated to the commission in violation of Article I, section 1, of the Constitution of the United States.

The commission exercised the legislative power delegated
23 to it to exempt carriers in an arbitrary manner. It called
for applications of exemption to be filed on or before September 15, 1922. According to its report more than 400 carriers

filed applications for exemption. There are approximately 1,000 carriers by railroad in the United States engaged in interstate commerce. At least several hundred of these carriers did not file applications for exemption. The commission states that but few of the carriers filing exemptions appeared for the purpose of introducing evidence. The commission proceeded upon this record to state in form that all carriers other than steam railroad carriers of Class I should be and were exempt from the application of paragraph 2 of section 22 of the interstate commerce act. The commission states further that if any carrier exempted should hereafter desire "to establish and maintain non-transferable interchangeable scrip coupon tickets under the conditions hereinbefore prescribed, our finding of exemption will not preclude them from doing so." Thus the commission after going through the formality of exempting many carriers in the absence of evidence, proceeded to leave to each of those carriers to determine for itself whether it would become subject to paragraph 2 of section 22 of the interstate commerce act. The commission delegated to each and several hundred carriers to determine the question whether they should or should not become subject to the law. This action was arbitrary and without due process of law in violation of the fifth amendment to the Constitution and was a delegation by the commission to the carriers of the legislative power which had been delegated by Congress to the commission.

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XXII.

The aforesaid order of the commission of March 6, 1923, is unlawful and void because it is not restricted to interstate commerce, but, on the contrary, applies to and includes transportation of passengers wholly within one State.

XXIII.

If as alleged by petitioners the order of the commission of March 6, 1923, is unlawfull and void, compliance with its terms and provisions will cause each of them irreparable injury for which they will have no adequate remedy at law. The sale of scrip coupon tickets will, as they are informed and believe, and therefore allege, reduce the passenger revenues of each of them approximately 6 per cent, a reduction for all of your petitioners of approximately \$28,800,000. If the scrip coupon tickets are sold and honored at the reduced rate prescribed and if the said order of March 6, 1923, should subsequently be held to be invalid and if it should be held that the petitioners cannot recover from the purchasers of said tickets the difference between the reduced fares and the standard fares they will be subjected to irreparable injury and to loss to the extent of many millions of dollars; and if it should be held that the petitioners could recover the difference between the reduced fares and the standard fares the petitioners would be obligated to bring at

least several hundred thousand suits in all jurisdictions throughout the United States and at great expense and with the probability that in many cases service upon the purchasers of scrip coupon tickets could not be obtained and that in many cases judgments obtained in favor of your petitioners would never be satisfied. Your petitioners allege that in the event of the sale of the scrip coupon tickets at reduced fares and a subsequent decision that the said order of the commission of March 6, 1923, is unlawful and void, your petitioners will be without adequate remedy at law to recover the enormous losses which they will sustain by compliance with said order.

XXIV.

The aforesaid order of the commission of *the commission of* March 6, 1923 (Exhibit D), is null and void and of no legal effect for the reasons set forth in paragraphs IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, and XXIII of this petition.

In consideration whereof and for as much as your petitioners are remediless in the premises and by the strict rules of the common law and to the end that they may obtain the relief to which they are entitled your petitioners now pray:

First. A permanent injunction decreeing that said order of the commission of March 6, 1923, be set aside, annulled, suspended, and its enforcement, operation, and execution forever enjoined.

Second. An interlocutory injunction suspending and restraining the enforcement, operation, and execution of said order of March 6, 1923, in whole and in part and setting the same aside.

Third. Such other and further relief as to justice and equity may appertain.

CHARLES F. CHOATE, JR.,
Solicitor for Petitioners.

26 STATE OF NEW YORK,
County of New York, ss.:

Alfred H. Smith, being duly sworn, says that he is the president of the New York Central Railroad Company, one of the petitioners in the above-entitled cause; that he has read the foregoing petition and knows the contents thereof; that said petition is true of his own knowledge except as to those matters alleged on information and belief; and that as to those matters he believes it to be true.

A. H. SMITH.

Subscribed and sworn to before me this 29th day of March, 1923.
[NOTARIAL SEAL.]

J. M. O'MAHONEY.

Notary Public.

Bronx County, clerk's No. 11, register's No. 43; certificate filed in New York County; clerk's No. 50, register's No. 4059. My commission expires March 30, 1924.

Exhibit A to petition.

Section 22, interstate commerce act (as amended by acts of March 2, 1889, February 8, 1895, and August 18, 1922).

SECTION 22. (1) That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: Provided, That no pending litigation shall in any way be affected by this Act: Provided further, That nothing in this Act shall prevent the issuance of joint interchangeable five thousand-mile tickets with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier subject to the provisions of this Act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this Act; and all the provisions of said section six relating to joint rates, fares, and charges, shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater

or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this Act shall apply to any violation of the requirements of this proviso.

29 (2) The Commission is directed to require, after notice and hearing, each carrier by rail, subject to this Act, to issue at such offices as may be prescribed by the commission interchangeable mileage or scrip coupon tickets at just and reasonable rates, good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The commission may in its discretion exempt from the provisions of this amendatory Act either in whole or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made. Such tickets may be required to be issued in such denominations as the commission may prescribe. Before making any order requiring the issuance of any such tickets the commission shall make and publish such reasonable rules and regulations for their issuance and use as in its judgment the public interest demands; and especially it shall prescribe whether such tickets are transferable or non-transferable, and if the latter, what identification may be required; and especially, also to what baggage privileges the lawful holders of such tickets are entitled.

(3) Any carrier which, through the act of any agent or employee, wilfully refuses to issue or accept any such ticket demanded or presented under the lawful requirements of this Act, or wilfully refuses to conform to the rules and regulations lawfully made and published by the commission hereunder, or any person who shall wilfully offer for sale or carriage any such ticket contrary to the said rules and regulations shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not to exceed \$1,000.

30

Exhibit B to petition.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 23rd day of August, A. D., 1922.

No. 14104.

Interchangeable mileage ticket investigation.

Whereas, an act (Public No. 281, 67th Congress) entitled "An act to amend section 22 of the interstate commerce act, as amended," approved August 18, 1922, reads:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 22 of the Interstate Commerce Act, as amended, is amended by insert-

ing '(1)' after the section number at the beginning of such section and by adding to the section two new paragraphs, to read as follows:

"(2) The Commission is directed to require, after notice and hearing, each carrier by rail, subject to this Act, to issue at such offices as may be prescribed by the commission interchangeable mileage or scrip coupon tickets at just and reasonable rates, good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The commission may in its discretion exempt from the provisions of this amendatory Act either in whole

or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made. Such tickets may be required to be issued in such denominations as the commission may prescribe. Before making any order requiring the issuance of any such tickets the commission shall make and publish such reasonable rules and regulations for their issuance and use as in its judgment the public interest demands; and especially it shall prescribe whether such tickets are transferable or non-transferable, and if the latter, what identification may be required; and especially, also to what baggage privileges the lawful holders of such tickets are entitled.

"(3) Any carrier which, through the act of any agent or employee, wilfully refuses to issue or accept any such ticket demanded or presented under the lawful requirements of this Act, or wilfully refuses to conform to the rules and regulations lawfully made and published by the commission hereunder, or any person who shall wilfully offer for sale or carriage any such ticket contrary to the said rules and regulations shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not to exceed \$1,000."

It is ordered, That a proceeding of investigation be, and it is hereby, instituted into and concerning the matters and things which the commission is directed by said act to investigate, with a view to the issuance of such order or orders or other requirements as may be proper and necessary to carry said act into effect.

32 It is further ordered, That this proceeding be, and it is hereby, assigned for hearing at the office of the commission at Washington, D. C., on Tuesday, September 26, 1922, at 10 a. m., before Commissioner B. H. Meyer.

It is further ordered, That unless good cause later appears to justify a different arrangement, testimony shall be received upon the following and related questions in the order designated:

1. Shall both interchangeable mileage and scrip coupon tickets be issued and sold?

2. What rate or rates shall be established as just and reasonable for each or either form of ticket? What conditions, if any, should be attached to the issuance and sale of such tickets by reason of the existence of different levels of passenger rates in different sections of the country?

3. In what denominations shall the ticket or tickets be issued?

4. In general, at what offices of carriers shall the tickets to be prescribed be available to the public?

5. What rules and regulations for the issuance and use of these tickets shall be required?

6. Shall the tickets be transferable or nontransferable? If non-transferable, what identification may be required?

7. To what baggage privileges shall the lawful holders of such tickets be entitled?

Carriers' proposals will be heard first, to be followed by cross-examination and then by the direct testimony of commercial and other organizations and individuals and cross-examination thereon.

33 It is further ordered, That each carrier seeking exemption from the provisions of this amendatory act must file with the commission a written statement to that effect on or before September 15, 1922, embracing briefly the grounds for such request for exemption; and testimony in support of such requests will be received at the close of that offered on the questions listed above.

It is further ordered, That all carriers by rail subject to the interstate commerce act be, and they are hereby, made respondents in this proceeding; and that copies of this order be served upon all such respondents, upon the governor and upon the railroad or other regulatory commission of each State, and upon such other individuals and organizations as may appear to have an interest in this investigation.

By the commission:

[SEAL.]

GEORGE B. MCGINTY,
Secretary.

34 *Exhibit C to petition.*

Interstate Commerce Commission.

No. 14104.

Interchangeable mileage ticket investigation.

Submitted November 15, 1922. Decided January 26, 1923.

1. Carriers by rail subject to the interstate commerce act, enumerated in Appendix C, required to issue nontransferable interchangeable scrip coupon ticket at just and reasonable rates prescribed herein.

2. Other carriers by rail exempted from provisions of the amendatory act.

Henry Wolf Bikle, John C. Bills, W. S. Bronson, Clyde Brown, N. S. Brown, George F. Brownell, E. G. Buckland, R. V. Fletcher, H. A. Taylor, and Francis I. Gowen for eastern carriers.

Frank W. Gwathmey, Henry Thurtell, William A. Northcutt, and Charles J. Rixey for southern carriers.

Wallace T. Hughes for western, southwestern, and transcontinental carriers.

C. M. Burt, C. L. Hunter, W. L. Pratt, T. Thompson, Eben E. MacLeod, E. L. Bevington, J. E. Hannegan, and W. H. Howard for various passenger associations.

Ben B. Cain for various members of American Short Line Association.

J. H. Crall for Central Electric Traffic Association.

35 Charles L. Henry for American Electric Railway Association.

A. H. Elder, W. C. Hope, James W. Carmalt, L. Agnew Meyers, J. W. Redmond, C. A. Cairns, W. H. T. Loyall, Charles D. Drayton, L. M. Allen, G. F. Thomas, Henry J. Hart, E. H. Scott, E. E. Williamson, Charles H. Blatchford, John Y. Calahan, Edward E. Gann, F. A. Wadleigh, C. P. Ryan, W. L. Morris, F. E. Batturs, J. D. Rahner, W. A. Russell, W. H. Tayloe, W. A. Beckler, E. M. Womack, H. H. Rauth, N. V. Hutchinson, J. A. Higgins, W. D. Cook, Frederick T. Grant, F. C. Coley, R. H. Wallace, W. W. Richardson, W. W. Pringle, W. F. Griffiths, M. J. Powers, E. D. Osterhout, George H. Parker, G. F. Snyder, C. L. Stone, W. J. Cannon, Dwight V. Jones, Richard A. Ford, P. S. Eustis, A. L. Craig, and William J. Craig for various carriers.

John E. Benton for regulating authorities of Arizona, Iowa, Nevada, New Mexico, North Carolina, Oklahoma, and Washington.

D. L. Kelley and Raymond C. Dillman for Railroad Commissioners of South Dakota.

Samuel Blumberg and Hoke Smith for National Council of Traveling Salesmen's Association.

James C. Lincoln, Hugh A. Holmes, Charles E. Cotterill, Fred L. Goddard, A. E. Beck, C. L. Hileary, John F. Shea, J. H. Tedrow, George P. Wilson, Thomas A. Delaney, Breed, Abbott & Morgan, Lamfrom & Tighe, and David K. Clink for various civic, commercial travelers', and hotel associations.

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REPORT OF THE COMMISSION.

MEYER, Chairman:

This proceeding was instituted upon our own motion pursuant to the amendment of section 22 of the interstate commerce act approved August 18, 1922, which provides that—

“(2) The Commission is directed to require, after notice and hearing, each carrier by rail, subject to this Act, to issue at such offices as may be prescribed by the Commission interchangeable mileage or scrip coupon tickets at just and reasonable rates, good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The Commission may in its discretion exempt from the provisions of this amendatory act either in whole or in part any carrier where the particular circumstances shown to the

Commission shall justify such exemption to be made. Such tickets may be required to be issued in such denominations as the Commission may prescribe. Before making any order requiring the issuance of any such tickets the Commission shall make and publish such reasonable rules and regulations for their issuance and use as in its judgment the public interest demands and especially it shall prescribe whether such tickets are transferable or non-transferable, and if the latter, what identification may be required; and especially, also to what baggage privileges the lawful holders of such tickets are entitled.

"(3) Any carrier which, through the act of any agent or employee, wilfully refuses to issue or accept any such ticket demanded or presented under the lawful requirements of this Act, or wilfully refuses to conform to the rules and regulations lawfully made and published by the Commission hereunder, or any person who shall wilfully offer for sale or carriage any such ticket contrary to the said rules and regulations shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not to exceed \$1,000."

Our notice of hearing suggested the following lines of evidence: (1) Shall both interchangeable mileage and scrip-coupon tickets be issued and sold? (2) What rate or rates shall be established as just and reasonable for each or either form of ticket? (3) What conditions, if any, should be attached to the issuance and sale of such tickets by reason of the existence of different levels of passenger rates in different sections of the country? (4) In what denominations shall the ticket or tickets be issued? (5) In general, at what offices of carriers shall the tickets to be prescribed be available to the public? (6) What rules and regulations for the issuance and use of these tickets shall be required? (7) Shall the tickets be transferable or nontransferable? (8) If nontransferable, what identification may be required? (9) To what baggage privileges shall the lawful holders of such tickets be entitled?

Our order of investigation also provided that each carrier seeking exemption from the provisions of this act should file with us on or before a day fixed, a written statement to that effect, briefly indicating the grounds for the request. Many applications were filed and evidence in support of some of them was received at the hearing. No opposition was expressed to any application for exemption.

At the opening of the hearing respondents reserved such rights as they might have to question the constitutionality of the act, or of any action we might take thereunder. This is discussed to some extent on briefs. We have repeatedly said that it is our duty to apply a statute as we find it, and that it is for the courts to determine the validity of the statute where that question arises.

The amendatory act affirmatively directs us to require, after notice and hearing, "each carrier by rail subject to this act" to

38 issue at such offices as may be prescribed by us "interchangeable mileage or scrip coupon tickets" at "just and reasonable rates, good for passenger carriage upon the passenger trains of all carriers by rail subject to this act." We may in our discretion exempt from its provisions, either in whole or in part, any carrier where the particular circumstances may justify such exemption. The act is mandatory in that it directs us, after notice and hearing, to require each carrier by rail subject to the act to issue "interchangeable mileage or scrip-coupon tickets." It is discretionary in that we may prescribe either an interchangeable mileage ticket or a scrip-coupon ticket. It is also left to our judgment to determine after notice and hearing the "just and reasonable rates" at which the form of ticket prescribed shall be issued.

All parties who appeared at the hearing are in substantial agreement with respect to most of the conditions, rules, and regulations under which the tickets shall be issued. Practically all expressed preference for an interchangeable scrip-coupon ticket over a mileage ticket. The scrip ticket contemplates the issuance of a book of coupons which for passenger travel are equivalent to currency, the coupons being detached by the ticket agent or conductor to cover the transportation charge at the time the service is performed. The mileage ticket also contains coupons which are detached to cover the mileage traveled. Every convenience or advantage inherent in a mileage ticket appears to be more completely and satisfactorily met by a scrip coupon ticket, both from the standpoint of the passenger and of the carrier. Certain practical difficulties which would arise from the use of an interchangeable mileage ticket will not arise from the use of an interchangeable scrip-coupon ticket.

39 The parties do not agree upon the rate at which the ticket should be sold. The commercial travelers ask that tickets be sold in the denomination of \$100 at rates 33½ per cent less than the standard fares. Respondents oppose any reduction from the standard fares. The amount of the rate is the most important question before us in this proceeding.

Passenger statistics.

The operating ratios of Class I steam roads for 1920 and 1921 by districts and for the United States indicate that passenger service is not producing an undue proportion of revenue. In 1921 the operating ratio for the United States for freight service was 81.79 and for passenger service 85.24.

The net railway operating income for the seven months ended July 31, 1922, of Class I carriers, including large switching and terminal companies, yielded returns of 4.76 per cent in the eastern group, 5.04 per cent in the southern group, 3.70 per cent in the western and mountain-Pacific groups, and 4.36 per cent in the United States as a whole, on the valuation used by us in Increased Rates, 1920, 58 I. C. C., 220.

The revenue passenger-miles, passengers per train, and passengers per car for each year, 1916 to 1921, and for the first six months of 1921 and 1922 are as follows:

40	Calendar year.	Passengers per train.	Passengers per car.	Revenue passenger- miles.
	1916.....	57	16	34,586,000,000
	1917.....	65	17	39,477,000,000
	1918.....	76	20	42,677,000,000
	1919.....	82	21	46,358,000,000
	1920.....	80	20	46,849,000,000
	1921.....	67	16	37,329,000,000
	1921 (first six months).....	66	16	18,382,000,000
	1922 (first six months).....	60	15	16,487,000,000

Classification.

Carriers have long recognized different classes of travel for each of which different rates of fare have been exacted; such as, the standard, the commutation, the convention, the excursion, and the summer and winter tourist.

Prior to Federal control the standard fare for interstate travel was in the greater part of the country approximately 2.5 cents per mile. For intrastate travel it was 2 cents per mile in many States. In some parts of the country, more particularly in the southern and western districts, the standard fare, both State and interstate, was higher than 2.5 cents.

In June, 1918, the director general established the minimum standard fare of 3 cents per mile, both State and interstate, for application by railroads under Federal control. In August, 1920, the standard fare was increased 20 per cent or to 3.6 cents per mile.

Commutation fares entitle the purchaser to daily transportation between designated points for fixed periods of time and are substantially lower per mile of travel than the standard fares.

41 In commutation fares both distance and time are determining factors. The convention fare is designed to take care of the movement of passengers within a limited time for a special purpose. Frequently carriers require the persons interested in the convention to guarantee a minimum number of passengers for carriage at a given time as a condition precedent to the granting of the special fare. The excursion fare has many of the characteristics of the convention fare in that it usually represents an intensified movement of passengers between particular points on particular days and within a defined period of time. The summer and winter tourist fares are as a rule on a higher level than the convention or excursion fares and apply between summer and winter resorts and other points. The convention, excursion, and tourist fares are admittedly established by carriers for the purpose of encouraging travel that might not otherwise occur. This amendment contemplates

that carriers shall be required to recognize an additional class of passenger travel and to provide a special form of ticket which shall be issued at just and reasonable rates fixed by us to cover such travel. The greatest users of this class of travel, if available at rates lower than the standard rates, will undoubtedly be commercial salesmen, business men, professional men, and others who make frequent trips.

History of mileage ticket.

The evidence indicates that mileage tickets were primarily issued, not for the purpose of stimulating passenger travel but as a means of inducing shippers to route freight over particular railroads. They were issued at fares lower than the standard fares for the convenience of and as a concession to shippers at a time when concessions were common. They were not infrequently given to shippers free. At one time it was customary to issue annual passes to large shippers who employed traveling men. Passes were issued with the idea that they would be used by the principal officers of the shipping concern. Mileage tickets were issued chiefly to take care of the traveling men employed by shippers. Moreover, by the use of mileage tickets carriers were able to extend favors to shippers commensurate with their respective freight shipments. That could not be done with term passes, as no record was kept of their use.

It later became the custom to use mileage tickets also in exchange for advertising, which continued until it was declared unlawful as to interstate commerce. The interstate commerce act and its amendments made it necessary for carriers to revise their practices from time to time. Carriers say that although most of them were convinced long before Federal control that the mileage book should be abolished, it was difficult for them to do so because of competition and because the custom had become deeply rooted by the sanction of time. They stress the fact that the demand of commercial travelers for mileage tickets at rates lower than the standard fares was just as insistent when the standard fare was 2.5 and 2 cents per mile as it is to-day. For some time prior to Federal control efforts were made by carriers to restrict the use of mileage tickets, so that by the time they were taken over by the Government the use of the mileage ticket had become so circumscribed in central passenger association territory, because confined to interstate passage, as to make the sale thereof negligible. Prior to October, 1917, it had been the custom for carriers in southeastern territory to issue a mileage ticket or book good for use by any member of the firm or corporation to whom issued. At that time this form of ticket was substituted for nontransferable tickets which contained 2,000 coupons and were sold at \$45.

On June 10, 1918, the director general abolished all mileage books and established in lieu thereof for the convenience of travelers an interchangeable scrip coupon ticket of denominations of \$15, \$30, and \$90, sold at the standard fare, and good on all passenger trains

operated by railroads under Federal control. At the expiration of Federal control the carriers continued the use of this form of ticket in the same denominations. This ticket, which is still in use, is interchangeable among practically all carriers by rail except electric and short-line carriers. The revenue from its sale is estimated to represent about 1 per cent of the total passenger revenue. It was originally established by the director general and was perpetuated by the carriers after Federal control, partly to relieve the congestion at ticket offices in the larger cities and partly to take the place of the mileage book and thus afford the public the convenience of boarding trains for short trips without the necessity of purchasing a ticket at the ticket office for each trip. The commercial travelers insist that the discontinuance of mileage books by the director general was in part to discourage unnecessary travel and to divert some travel from the steam roads to other forms of transportation. To what extent the director general was influenced by a desire to increase passenger revenue is not disclosed.

Immediately prior to the time that mileage tickets were abolished by the director general they had been sold at reductions below
 44 the standard fare ranging from 10 to 20 per cent, namely, 10 per cent in New England, 10 per cent in central and trunk-line passenger association territories, 20 per cent in southeastern territory, and 16 $\frac{2}{3}$ per cent in southwestern territory. At an earlier period they had been sold in some parts of the country at reductions of 33 $\frac{1}{3}$ per cent.

The evidence with respect to the extent of the use of mileage tickets prior to Federal control tends to indicate that in some parts of the country and at certain periods not less than 20 per cent of the total passenger revenue was derived from the sale of mileage tickets, and that over some routes between particular points the revenue from mileage tickets exceeded 60 per cent of the total revenue derived from passenger traffic between such points. Carriers have never issued an interchangeable mileage ticket good for use on all railroads in all parts of the country. Mileage tickets were issued good for use over particular lines and were interchangeable as to carriers within defined territories, sometimes including a large number of railroads.

Demand for mileage ticket at reduced fare.

The demand for an interchangeable mileage or scrip coupon ticket comes chiefly from organizations of commercial travelers. That demand is also supported to some extent by shippers who employ commercial travelers and by a national hotel association. These organizations and associations introduced evidence designed to show that we should require respondents to issue an interchangeable scrip coupon ticket in denominations ranging from \$50 to \$150. Some suggest that the tickets should be issued in denominations of \$50,
 45 \$100, and \$150. Commercial travelers organizations generally favor a ticket in the denomination of \$100. All urge that

the tickets should be sold at $33\frac{1}{3}$ per cent less than the standard fare and that they would stimulate travel to such an extent as to offset any decrease of revenue that might result from the reduction in the fare. They say that the stimulus from the use of such a ticket would in all probability result in increased revenue. They also urge that salesmen would by their sales stimulate the movement of freight traffic and thereby augment freight revenue. One of their witnesses stated that an interchangeable ticket purchasable at $33\frac{1}{3}$ per cent below the standard fare would become so common in its use as to represent 25 per cent of the total travel. The commercial travelers attempt to justify their request for a mileage ticket at $33\frac{1}{3}$ per cent less than the standard fare upon the claim that prior to the discontinuance of the mileage ticket, carriers voluntarily sold such tickets at such a discount and that they now sell tourist and summer and winter excursion tickets at discounts as great as that. The evidence indicates that carriers did not generally sell mileage tickets at discounts as great as $33\frac{1}{3}$ per cent, except during early periods when concessions from tariff rates were common, and within restricted territories.

Certain witnesses stated that there was a substantial falling off in the number of commercial salesmen on the road during 1921 and during the first six months of 1922 as compared with 1920. They attribute this to the high passenger fares established as a part of the general increases of August, 1920; and say that many salesmen who operate on a commission basis and many mercantile houses refrained, during those periods, from inaugurating road trips because of the high passenger fares.

46 The record does not support the statement that the falling off in revenue passenger-miles during 1921 and the first six months of 1922 was due chiefly to the high level of passenger fares. This confirms what we said in *Reduced Rates, 1922*, 68 I. C. C., 676, where we pointed out that the decrease in revenue passenger-miles in 1921 was the result of many contributing causes which included business depression, the increased use of motor vehicles, the improvement of highways, and the high level of passenger fares. The passenger fare was undoubtedly a contributing cause, but it is contrary to the evidence to say it was the only or even the chief cause. The removal on January 1, 1922, of the war tax of 8 per cent on passenger fares did not measurably stimulate passenger travel during the succeeding six months.

Carriers admit that a reduction in fares, more substantial than their revenues can stand, might stimulate travel to some extent but urge that there is no ground for the conclusion that such stimulus would be sufficient to offset the loss of revenues which in their judgment would result from such a reduction. They fear that an interchangeable mileage or scrip coupon ticked good for passage on all of the principal carriers, if sold below the standard fare, would in the course of time be used by passengers who would otherwise pay the standard fares; and that even though some additional travel might

be stimulated by the lower fare, the loss of revenue from the passengers who would have traveled in any event at the standard fare would offset any gain in revenue from the stimulated travel. Appendix A reflects carriers' estimate of the use of a nontransferable mileage or scrip book requiring identification by photograph and autograph, time limit one year, at varying reductions in fares, and of the loss of revenue that would result. Appendix B reflects the same information with respect to a mileage or scrip book good for presentation by holder without any requirements as to identification.

The commercial travelers also urge that the interchangeable coupon ticket at the reduction suggested by them is justified on the ground that it involves what is equivalent to the wholesale purchase of transportation. They say that carriers themselves have recognized this wholesale principle in the establishment of carload rates lower than less-than-carload rates and in the establishment of fares for commuters, excursionists, and tourists less than the standard fares, and that it is recognized by public utility corporations in the sale of gas, electricity, and the telephone. In the mercantile world the wholesale principle generally involves the element of resale which is entirely lacking with respect to the interchangeable scrip or mileage ticket. It will be found upon examination that there is no true analogy between the carload rate and the interchangeable scrip ticket. The carload rate involves one shipment, from one consignor to one consignee, in one day, in one car, whereas the scrip or mileage ticket involves the purchase of a book which, generally speaking, is not used for one passage but is used, or at least may be used, for many trips at different times and for varying distances throughout the life of the ticket. Moreover, the transportation of less-than-carload shipments involves greater service and greater cost than does the transportation of carload shipments. There would be some analogy between the scrip or mileage book and the carload rate if after the shipper had paid the carrier the carload rate he had the privilege of delivering the shipments, which make up the carload lot, at different times at different destinations on different railroads throughout the country.

Another ground suggested by commercial travelers in justification of a scrip or mileage ticket at reduced fares is that carriers would receive the benefit of the use of the money paid for the tickets in advance of the use of the transportation. The evidence as to this is inconclusive. It tends to show that no real benefit would inure to carriers from this source. It is the custom of carriers to adjust interline accounts by balances once a month. The statement is made that the average life of the old mileage books was 60 days. As the carrier which sells the ordinary interline ticket now has the use of the money for 30 days, it would appear that if the average life of the ticket can be assumed to be 60 days, that the carrier which receives the money for the sale of the ticket would have the use of that money only 30 days longer than it would have it from the sale of an

ordinary interline ticket. The evidence also tends to show that any benefit that carriers might derive from the advance use of the money would be more than offset by the additional expense to them of accounting and policing the use of the mileage or scrip tickets. They estimate that the additional expense to Class I carriers would be approximately \$1,680,000 per annum.

Carriers urge that a scrip book at reduced rates will result in preference to one class of passengers and in discrimination against another class. They point out that in substance the commercial travelers desire the privilege of purchasing \$100 worth of transportation measured by the standard fare at \$66.67 when sold as an interchangeable scrip book and suggest that if the so-called wholesale principle is to be recognized that any prospective passenger who intends to travel between New York and Chicago or between any points where the fare is as much or greater than \$66.67 should be entitled to the discount of 33½ per cent.

Conclusion.

The amendment to the act pursuant to which this proceeding was instituted does not upon its face indicate upon what basis an interchangeable mileage or scrip ticket should be issued. The spirit and the apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare, which would be just and reasonable because it would be sold in such quantities as to stimulate travel, and thereby increase net revenue or at least offset any loss in revenue that might result from the reduction, in which event carriers would render greater service to the public. It is a well recognized rule in trade and commerce that, other things being equal, as the price of an article is lowered the sales increase. And the fact that for many years prior to Federal control carriers voluntarily sold mileage books at discounts ranging from 10 to 33½ per cent is not without significance. That commutation and excursion fares create traffic is conceded by carriers. That some additional traffic would be created by a scrip ticket at reduced fares may fairly be assumed, although it is impossible to determine how much. Many unused coupons would not be redeemed while others which remained in the book near the end of the year or season would undoubtedly be used for passenger travel that would not otherwise occur. A scrip ticket at reduced fares could not be justified solely upon the theory that the cost per passenger-mile might thereby be reduced, although it is apparent that anything that will tend to cause a fuller utilization of passenger-train facilities without overcrowding will also tend to reduce the average cost per passenger-mile.

If carriers are to be required to issue a mileage or scrip coupon ticket at a reduced fare it must be mainly upon the assumption that travel will be stimulated thereby. The question whether the mileage or scrip coupon ticket at reduced fare will stimulate travel sufficiently

to increase or to equalize any loss in revenue that might result must remain in the realm of speculation until and unless such a ticket is established and experience recorded. The evidence neither proves the affirmative nor the negative of the question whether the mileage book used in the past stimulated travel and whether reductions in fares increased the number of revenue passenger-miles. The evidence as to the use of the mileage books is too indefinite to be helpful, or to afford a guide in determining for the future the question whether a scrip ticket at a reasonable fare below the standard fare would increase or decrease carriers' revenues. The testimony of merchants, manufacturers, and commercial travelers is to the effect that an interchangeable mileage ticket at reduced fares would result in a greater number of salesmen being put on the road. And, of course, the use of such a ticket would not be restricted to commercial travelers and business men. It would be open to all. In addition to the obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established, at least for an experimental period. In no other way can the apparent purpose of the law be given practical effect.

We find and conclude that on and after March 15, 1923, carriers by rail, respondents herein, enumerated in Appendix C, shall establish, issue, and maintain, at such offices as we may hereafter designate, a nontransferable interchangeable scrip coupon ticket in the denomination of \$90, which shall be sold at a reduction of 20 per cent from the face value of the ticket. We further find that the rates resulting from that reduction will be just and reasonable for this class of travel. This scrip coupon ticket shall be good, within one year from the date of its sale, for carriage of passengers on all passenger trains operated by said respondents, except that in the case of special or extra-fare trains its use will be subject to the payment by the passenger of the special or extra fare. Respondents shall keep a record of the use of the tickets during the first 12-month period which should reflect its effect on passenger revenues, the number of scrip tickets sold, and the gross revenue derived from their sale. Parties other than carriers, primarily interested in this experiment, should likewise record their experience with this ticket in order that the actual results of the experiment may be ascertained to the fullest extent possible. Any party to this proceeding may bring the matter to our attention for further consideration on or about January 1, 1924, with such statements as they choose to make concerning the operation and effect of the scrip tickets.

By request of the parties and for the purpose of affording them an opportunity to confer we will defer action on the rules and regulations which shall govern the issuance of the scrip ticket for 30 days from the service of this report. Before the expiration of that period the parties will be expected to submit to us the result of their efforts to agree upon a set of rules and regulations. Upon receipt of this advice we will enter an appropriate order.

Exemptions.

Under the amendatory act we are authorized to exempt from its provisions "either in whole or in part any carriers where the particular circumstances shown to the commission shall justify such exemption to be made." More than 400 carriers filed applications for exemption prior to the hearing although comparatively few appeared for the purpose of introducing evidence. The applications include a few Class I carriers. But in the main the applications are from Class II and Class III carriers, electric carriers, and switching and terminal carriers. No evidence was introduced in opposition to these applications.

The applications of Class I carriers are based chiefly upon the objection to interchangeable scrip or mileage coupon ticket at any rate below the standard fare. The principal reasons assigned for exemption by the short lines, the electric, and the switching and terminal carriers are that they are engaged chiefly in intrastate commerce, that their passenger traffic is negligible, that they do not honor or sell passenger tickets to and from points on other lines, that they have no passenger-train service, and that there will be little or no demand of them for interchangeable scrip or mileage tickets. We are of the opinion that the particular circumstances shown to us warrant the exemption of all carriers by rail which are not included in Appendix C. We therefore conclude that,
 53 until otherwise ordered, all such carriers be, and they are
 hereby exempted from the provision of paragraph 2, section
 22, of the interstate commerce act as amended.

In addition to the above, we further conclude that certain branches and parts of the lines of carriers hereinafter described shall also be exempted from the provisions of the amendatory act: The main line west of Roanoke, Va., and all branch lines in West Virginia of the Virginian Railway Company; the Key West extension south of Homestead, Fla., of the Florida East Coast Railway Company; the Orchard Beach branch extending from Old Orchard to Camp Ellis, Me., a distance of 3.8 miles, the branch from Fayban to Base Mount, Washington, N. H., a distance of 6.7 miles, and the Bethlehem branch, extending from Bethlehem Junction to Bethlehem, N. H., a distance of 3.4 miles, of the Boston & Maine Railroad Company; the Okolona branch of the Southern Railway Company operated by the Mobile & Ohio. The Okolona branch is located entirely within the State of Mississippi and connects with the Mobile & Ohio at Okolona and with the Gulf, Mobile & Northern at Houston, Miss. It does not connect with the Southern Railway. Its rails extend from Okolona to Calhoun City, a distance of 37.7 miles.

If any of the carriers exempted should hereafter desire to establish, issue, and maintain nontransferable interchangeable scrip coupon tickets under the conditions hereinbefore prescribed, our finding of exemption will not preclude them from doing so.

HALL, Commissioner, dissenting:

The statute under which we are acting is the interstate commerce act as amended by the addition to section 22 of the two paragraphs set forth in full in the majority report. These added paragraphs contain directions to this commission. They do not purport to lay any mandatory duty directly upon the carriers, and the carriers remain subject to all other sections of the act, including the direct mandatory duties laid upon them by the first four sections of the act, to establish just and reasonable fares and charges, free from unjust discrimination and undue prejudice of preference, and the requirements of section 6.

If, in following the directions thus given us, we require the carriers to do anything which runs counter to what the act itself requires, or which the act by its own terms prohibits and declares unlawful, they may deem themselves in this quandary that they must either violate the act or disobey our order, and in either case incur the penalties provided. It plainly behooves us, therefore, to construe the directions thus given us in such wise as shall be consistent with the rest of the act. That such was the intent of Congress is made plain in the first two sentences of the amendment as finally enacted. They read:

"(2) The commission is directed to require, after notice and hearing, each carrier by rail, subject to this act, to issue at such offices as may be prescribed by the commission interchangeable mileage or scrip coupon tickets at just and reasonable rates, good for passenger carriage upon the passenger trains of all carriers by rail subject to this act. The commission may in its discretion exempt from the provisions of this amendatory act either in whole or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made."

These directions call for compliance by us in substance as well as in form. Our requirements are to be general and comprehensive. At just and reasonable rates, so determined by us after hearing, interchangeable tickets are to be issued by and honored on the passenger trains of all carriers by rail subject to the act, except a carrier exempted because of particular circumstances shown to us. The hearing was had. Such requirements if made without hearing would be arbitrary, and *and* therefore void. Are they not in legal effect also arbitrary to the extent that the results of the hearing are disregarded?

The requirements of the report are confined to the respondents enumerated in Appendix C, some 200 Class I carriers. Three or four times as many other carriers are thus in effect exempted. The record abundantly demonstrates that this exemption is not made because "particular circumstances shown" to us justified the exemption. As the report itself states, our order of investigation provided that each carrier seeking exemption should file application therefor indicating the grounds, many applications were filed, and evidence in support of some of them was received at the hearing. Plainly the exemption

is not confined to the carriers so heard. The process is reversed and all carriers are made exempt except those enumerated. The universality or general scope of the requirement is thus defeated.

But this departure from the statute is minor as compared with what is done in fixation of just and reasonable rates. Those terms are not unfamiliar. This commission has been construing and applying them for more than 35 years. The Director General of Railroads in 1918 fixed the minimum basis for standard fares at 3 cents per mile. In 1920, after a prolonged hearing and upon an ample

56 record, we found that those fares increased by 20 per cent would be just and reasonable. In 1922, after another prolonged hearing and upon another ample record, we found the 3.6-cent basic standard fare still just and reasonable. On the record now before us it was not shown, indeed there was no attempt to show, that this basic fare is not still just and reasonable. On the contrary, the whole showing was based on the premise that this basic rate should be retained, but that some passengers, those who purchased these tickets, should receive transportation at lower rates than other passengers.

One after another the grounds on which this was urged are dismissed by the majority as unsubstantiated until the "class" theory is reached. That, and the "obvious spirit" or "apparent purpose" of the statute, as the majority see it, alone support their finding that the rates resulting from sale of scrip coupon books in the denomination of \$90 at a reduction of 20 per cent will be just and reasonable for this class of travel.

The amendatory statute is one of nine bills introduced in Congress in April, 1921, all requiring issuance of interchangeable mileage tickets or books at reductions of either 20 per cent or 33 $\frac{1}{3}$ per cent from the regular fare, except one which named 2.5 cents per mile, subject to modification by us in proportion to substantial alterations in the average rate level. Two of these bills specified that the mileage books were to be for the use of commercial travelers. The majority say:

"The spirit and the apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare, * * *."

That requirement was omitted from the bill before it became law.

57 In place of it was substituted the direction to us to require, after hearing, issuance and acceptance of tickets at just and reasonable rates. I submit that the fairer construction of the act is that the Congress expected us to determine in this case, as in any other, what the just and reasonable rate would be. If that rate is the standard rate—and to my mind nothing in this record shows that any lower rate would be just and reasonable—we should prescribe that rate and give our reasons in our report.

The majority recognize that the demand for this ticket comes chiefly from organizations of commercial travelers, and that what they seek is a lower rate than that paid by other travelers who do not hold such tickets. In other words the holders of these

tickets are to be in a preferred class, whatever may be the just and reasonable rate paid by the public generally. Special privilege dies hard, and the craving for it never dies. But I see no good reason why, reading the act as it is written, we should give to it the gloss for which these organizations contend. The "class" set up by the majority embraces only those, and all those, who have \$72 in money available with which to buy \$90 in scrip, and want to spend the money in that way. There is no other criterion or determining feature. The man or woman of small means, who must needs travel some, or would travel more if fares were lower, is excluded from the benefit of this reduction unless he or she can accumulate \$72 to be paid over in one payment, and can also look forward to 2,500 miles of travel in one year. The conclusions reached enable those with \$72 in hand to exchange it, in effect, for a cheaper money which may be used in payment "for carriage * * * on all passenger trains operated by said respondents," as the report prescribes. The exceptions do not exclude its use in payment of excursion or commutation fares. The report will not be complete, and under the statute no order can be made, until we shall have published rules and regulations for the issuance and use of such scrip. It may be that these rules will temper the broad language of the report.

I pass over other features of the amendatory statute and of the report. Some of them appear in the dissenting expressions of my colleagues. That the conclusion reached by the majority is in legal effect arbitrary and based upon an erroneous conception of this commission's powers and duties seems to me apparent from the report itself, which classifies not only passengers but carriers according to their means. The record contains nothing which convinces me that the use of this form of ticket will reduce the cost of service and therefore entitle the holder to a lower rate. The report does not so find, as I read it. I venture to here repeat what the chairman of the Committee on Interstate Commerce said in discussing this amendment on the floor of the Senate:

"In so far as the use of transportation in that form [scrip coupon ticket] reduces the cost of the service, I believe that it is constitutional and would be within the authority of the commission, if we adopt the amendment I have offered, to reduce the mileage rate of these mileage tickets or books to that extent; but when it comes to the further question of allowing a commercial traveler, simply because he is a commercial traveler, to travel at less than I have to pay when I travel, I rebel."

I am authorized by Commissioner Potter to say that he concurs in this expression of dissent.

59 DANIELS, Commissioner, dissenting:

The amendment of section 22 of the interstate commerce act is referred to in the majority report as follows:

"The amendment to the act pursuant to which this proceeding was instituted does not upon its face indicate upon what basis an inter-

changeable mileage or scrip ticket should be issued. The spirit and the apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare, which would be just and reasonable, because it would be sold in such quantities as to stimulate travel and thereby increase net revenue, or at least offset any loss in revenue that might result from the reduction, in which event carriers would render greater service to the public. It is a well-recognized rule in trade and commerce that, other things being equal, as the price of an article is lowered the sales increase."

To the above interpretation of the amendment I take no exception. I think it difficult, if not impossible, to escape the conclusion that the intent of the amendment was to require us to prescribe in connection with mileage books or scrip coupon books a fare per mile less than the basic fare of 3.6 cents per mile. This conclusion is confirmed by that part of the amendment which, in imposing the duty upon the commission, reads: "* * * * and especiall it shall prescribe whether such tickets are transferable or nontransferable, and if the latter, what identification may be required; * * *."

It seems clear that if the fare per mile to be enjoyed in connection with these books were not less than the basic fare there would be no meaning in the requirement that we shall prescribe whether

60 or not the books shall be transferable or nontransferable.

Clearly there would be no reason why a book affording the basic fare of 3.6 cents per mile should not be transferable, either from the standpoint of the passenger or the carrier.

But the report contains another, and, as it seems to me, a very different interpretation of the amendment where, after pointing out certain distinguishing characteristics of commutation, convention, excursion, and tourist travel, it says:

"The convention, excursion, and tourist fares are admittedly established by carriers for the purpose of encouraging travel that might not otherwise occur. This amendment contemplates that carriers shall be required to recognize an additional class of passenger travel and to provide a special form of ticket, which shall be issued at just and reasonable rates fixed by us to cover such travel. The greatest users of this class of travel, if available at rates lower than the standard fare, will undoubtedly be commercial salesmen, business men, professional men, and others who make frequent trips."

This latter interpretation of the amendment is, in my judgment, erroneous, in that it attempts to base the decision of this case upon the assumption that there is another distinct "class of passenger travel" as yet unrecognized by the carriers but whose recognition that statute now forces upon them. The attempt to assimilate this newly discovered type of passenger travel to commutation, convention, excursion, or tourist travel is, in my judgment, not only fallacious, but directly contrary to the provisions of sections 2 and 3, which forbid all unjust discrimination and all "undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality * * * in any respect whatsoever."

61 This class of passenger travel which is newly created under the decision herein comprises only those whose income permits or whose business requires them to travel at least 2,500 miles a year and who have at least \$72 in cash to pay in advance for a \$90 scrip coupon book. It is implied that these persons are potentially extensive travelers, that their propensity to engage in heavily augmented travel is held in serious check because they can not now obtain transportation at a lower basic fare per mile than the general traveling public. But that they would increase their relative amount of travel to any greater extent than the general traveling public, if the latter, or a greater part thereof, were accorded the same discount in the purchase of transportation is certainly not proved by this record and is contrary to all reasonable expectation based on experience. This aspect of the case was voiced by a protesting State commission, which declared:

"If the Interstate Commerce Commission can and will issue mileage books in such denominations that they will be available to all persons traveling, and their purchase for ordinary trips will be available at 3 cents per mile, we are for such arrangement. We are not, however, in favor of the public generally being compelled to pay higher rates to support mileage books for special interests."

This so-called new class of passenger travel fails to have such distinguishing marks as constitute distinct characteristics in the case of commutation, convention, excursion, and tourist travel. As indicated correctly in the report, any diminution in the price of passenger travel per mile tends, in the absence of countervailing causes, to augment the aggregate of passenger travel. In this sense commutation, convention, excursion, and tourist fares are analogous to the proposed reduced fares for this new class of passenger travel involving an initial cash outlay of \$72. But there can be no 62 reasonable doubt that the same effect, to wit, augmented passenger travel, would tend to follow any and every reduction of fare, such as in the standard fare of 3.6 cents per mile for single passenger trips. In other words, we can not find in this tendency which affects all travel alike the distinguishing marks of a new and special class of passenger travel.

The other special classes of passenger traffic have certain specific marks or characteristics which distinguish them, more or less sharply, from passenger travel generally.

Commutation fares are based on the fact that many city workers live in relatively near-by suburban districts; journey daily to and from work; and make no demand for baggage service. The carrier can therefore with comparative certainty calculate in advance upon a steady, heavy, and daily volume of travel. This permits affording a rate of fare, lawfully open to all purchasers, but as a matter of fact utilized almost exclusively by a particular class. It is hedged about by the requirement of being used within the month for which the ticket is commonly valid. Its use is confined to stretches of line not

unduly long. Parallel suburban electric lines often afford a competitive service which would render the discontinuance of commutation fares by steam roads practically impossible. This constant, heavy, and daily volume of travel over short stretches of line differentiates this kind of service from passenger service generally.

The convention and excursion fares are characterized not merely by the lower rate per mile, but by the virtually predictable volume of traffic which these fares evoke. They permit preparation in
 63 advance for accommodating a more or less certainly ascertainable number of passengers whose journeys will fall within designated periods. While such fares undoubtedly stimulate travel because they offer a temporary abatement of the going rate, they are feasible only under conditions which afford the carriers full opportunity in advance to cope with the exceptional temporary volume of travel. It seems clear that a special excursion fare, good for three days, let us say, to Niagara Falls, will afford extra trainloads of passengers. But were this fare permanently to supplant the standard fare to the same destination it is clear that the extra volume of travel would not be continuous, and that, even if it were, the carrier could not ordinarily render the physical service continuously without impairment of other services which it is bound to afford. For example, a special excursion fare on a holiday may serve to fill coaches which would otherwise stand idle. But the temporary surplus of equipment ceases with the resumption of the ordinary tide of daily travel. The characteristic feature of convention and excursion travel may be found in the time limitations attached and the opportunity such time limitations afford to the carrier to provide the special accommodation necessary.

The tourist fares and tourist travel are unlike the types previously described in that they are generally seasonal and afford a longer period within which the tourist may elect to travel. It may be said, however, that the travel to which they apply is normally long-distance travel. This, of itself, delimits somewhat sharply the extent to which this service will be demanded. Pullman service is likely to be required by the tourist, and this relieves the carrier
 by railroad to a degree of certain burdens which the exclusive
 64 use of ordinary coaches would entail. The reservation of Pullman service by the tourist may also serve as something of advance notice of the time when such tickets must be honored. Furthermore, seasonal forecasts based on past experience allow some considerable knowledge in advance of the probable extent of tourist travel. In other words, the extent to which empty space on through trains for long trips is capable of being partly filled by the offer of tourist rates of fare is also characteristic of this traffic.

The above-described classes of passenger travel then have fairly well-defined and special characteristics. Commutation service is unique in its large volume, its regularity, and in the delimited area within which it is demanded and supplied. The extra service in-

volved in excursion and convention travel is capable of close calculation, in advance, both as to the revenue it is likely to yield and as to the extent to which special physical provision must be made therefor. Tourist travel is seasonal, is generally for long distances, and is also capable of fairly accurate provision.

The so-called additional class of travel which the report says the carriers must now recognize has seemingly no distinctive characteristics. Within the year's limit the travel may be taken at any time, on any train, and for any distance. It may be taken in one trip or distributed over as many journeys as the holder desires. Such a preferred class of travelers appears to be artificially and not naturally created. True, they may travel more miles than they would do but for the minimum one-fifth discount from the regular rate of fare. But so would practically all patrons of passenger service in the course of a year. In short, the requirements of the amendment

do not seem to me to necessitate, and other sections of the act
65 seem to me to preclude, the creation of a class of travelers entitled to the privileges herein proposed.

The majority report, which correctly rejects the analogy of the wholesale principle in commercial practice as applied to the purchase of passenger transportation, and which minimizes the suggestion that any substantial advantage would accrue to the carriers from the use of money paid in advance for scrip books, and which expressly concedes the fact that the passenger traffic as a whole is less profitable than other traffic, as gauged by the respective operating ratios, is practically silent as to the probable effect of the price set for scrip books upon the carriers' net railway operating income. As appears in Appendix A, the carriers' experienced passenger traffic officials estimate that the book sanctioned by the majority report and at the price sanctioned therein will result in 30 per cent of all revenue passenger travel moving on this basis. They similarly estimate the shrinkage in income, so far as not offset by increased travel induced by the discount on the scrip books, at \$60,000,000. If the carriers' net railway operating income continues as it has been for the past two years at about 4 per cent on the value of their property, and if the passenger traffic contributes thereto less than other traffic, the possible shrinkage may well evoke the most careful consideration. To offset the estimated loss of \$60,000,000 will apparently require an additional gross passenger revenue of \$300,000,000 annually, if we assume a passenger operating ratio of 80 per cent. Is it credible that the newly created class of travelers will expend anything like that sum over and above what they would spend for travel without any discount? For the first six months of

1922, the gross passenger revenue was but slightly in excess
66 of \$500,000,000. It is probable that a 20 per cent discount on tickets purchased only at a minimum initial cash outlay of
\$72 will augment the total of passenger gross revenue by 30 per cent?

As above suggested, it must be admitted that the amendment must be fairly construed as requiring some abatement from the standard rate of fare for the purchasers of interchangeable scrip or coupon tickets. But the abatement must be such as to conform with the provision requiring "just and reasonable rates" to be established. In the absence of any very certain knowledge of the effect upon carriers' net revenue, we are required perforce to experiment. But with current returns upon carrier property running about 4 per cent on the average, our discretion in experimentation must be narrow. Particularly is this true as to carriers like the New Haven and the Long Island where passenger revenue yield 50 and 70 per cent, respectively, of their gross revenue.

The passenger operating ratio for the first six months of 1922 has been estimated at about the passenger operating ratio for 1921, or at 85.24 per cent. This would imply that the passenger operating expense for the first six months of 1922 was about \$428,000,000. The residue from gross passenger receipts of about \$500,000,000 is \$72,000,000. When taxes and other items are deducted the net railway passenger operating income becomes \$48,600,000. If we double this for the 12 months of 1922, we have \$97,200,000 as the total passenger income. This is threatened by this decision with a reduction of \$60,000,000, less what may accrue from increased travel due to the discount on the scrip books.

The utmost I think we would be justified in considering experimentally is a 10 per cent abatement from the basic fare.

67 We might well exempt therefrom carriers whose current net railway income is so narrow that lessened passenger revenue would endanger their financial stability. We might, however, restore, at least experimentally, what was previously in effect, to wit, a book which would normally afford 1,000 miles of travel from whose use the estimated shrinkage in net passenger income, so far as not offset by increased demand, would be only about \$30,000,000. This would mean the sale of an interchangeable scrip coupon book, good for one year, containing nontransferable, interchangeable scrip coupon tickets in the aggregate sum of \$36, to be sold for \$32.40 cash. It is true that this limit is an arbitrary one and that it would create a preferred class of travel; but it has at least this argument in its favor, that such book mileage was common prior to the war; and when its use was properly policed, its existence did not effect a discrimination generally complained of as undue.

This plan would at least avoid the creation of a preferred class necessarily limited to a small per cent of the total number using passenger service, and would have the advantage of appealing to a much more numerous constituency of railway patrons, whereby to increase the use of passenger service and thereby offset the net loss that must result from according a special privilege to a smaller numerical class.

EASTMAN, Commissioner, dissenting:

The conclusion of the majority is founded upon two premises:

(1) That the "spirit and the apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare."

68 (2) That the reduced fare will stimulate traffic.

With reference to the first premise: The law merely directs us to require carriers to issue "interchangeable mileage or scrip coupon tickets at just and reasonable rates." Nothing is said about rates "less than the standard fare," and I am not ready to believe that Congress wished us to imply something which it was unwilling to say openly.

With reference to the second premise: In *Reduced Rates*, 1922, 68 I. C. C., 676, I said at page 740:

"In this connection, a word as to passenger fares. Neither the statistics before us nor the apparent trend of traffic, in my opinion, justify a reduction in these fares at the present time. The main argument in support of a reduction is that the carriers would gain by the stimulus to traffic more than they would lose by the decrease in rate per mile. This, however, is not a matter which can be determined with any degree of certainty. It is rather a question of business judgment or wisdom. One of the chief objects of the return of the railroads to their owners was to reap the advantages of the exercise of private initiative. While public regulation is necessarily an interference with management, it was not the intent of the act, as I read it, that we should substitute our judgment for the judgment of the managers under such circumstances as these. But it is not unfair to say that the private managers have here an opportunity to demonstrate to the country the benefits of their initiative."

I still believe that this is sound doctrine, and it applies here as well as to a general reduction in passenger fares. There is little, if any, more reason for believing that the reduction granted by the order in this proceeding to a few travelers will stimulate
69 traffic to the advantage of the railroads than for believing that a general reduction would accomplish the same result. Until better reasons can be advanced than those upon which the majority rely, therefore, I am not prepared to find that interchangeable mileage or scrip coupon tickets should be issued at "less than the standard fare." I fear that the action taken in this case will postpone the day of a reduction for the benefit of all travelers, which is far more to be desired.

APPENDIX A.—Book identified by photograph and autograph; use limited to purchaser; time limit, one year.

Reduction.	Mileage book.	Scrip book.	Estimated proportion of all travel using mileage or scrip book.		Total amount of reduction (estimated).	
			Percent.	Amount.	Mileage book.	Scrip book.
30 per cent.....	5,000-mile.....	\$180	24	\$240,000,000	\$72,000,000	\$72,000,000
25 per cent.....	do.....	180	21	210,000,000	52,500,000	52,500,000
20 per cent.....	do.....	180	18	180,000,000	36,000,000	36,000,000
15 per cent.....	do.....	180	15	130,000,000	22,500,000	22,500,000
35 per cent.....	3,000-mile.....	108	30	300,000,000	75,000,000	75,000,000
30 per cent.....	do.....	108	25	250,000,000	50,000,000	50,000,000
15 per cent.....	do.....	108	20	200,000,000	30,000,000	30,000,000
25 per cent.....	2,500-mile.....	90	35	350,000,000	87,500,000	87,500,000
20 per cent.....	do.....	90	30	300,000,000	60,000,000	60,000,000
20 per cent.....	1,000-mile.....	36	40	400,000,000	80,000,000	80,000,000

APPENDIX B.—Book without identification, good for presentation by holder.

Reduction.	Mileage book.	Scrip book.	Estimated proportion of all travel using mileage or scrip book.	Total amount of reduction (estimated).	
				Mileage book.	Scrip book.
30 per cent.....	5,000-mile.....	\$180	.....	\$225,000,000	\$225,000,000
25 per cent.....	do.....	180	.....	187,500,000	187,500,000
20 per cent.....	do.....	180	\$750,000,000	150,000,000	150,000,000
15 per cent.....	do.....	180	.....	112,500,000	112,500,000
25 per cent.....	3,000-mile.....	108	.....	200,000,000	200,000,000
20 per cent.....	do.....	108	.....	160,000,000	160,000,000
15 per cent.....	do.....	108	800,000,000	120,000,000	120,000,000
25 per cent.....	2,500-mile.....	90	.....	200,000,000	200,000,000
20 per cent.....	do.....	90	800,000,000	160,000,000	160,000,000
20 per cent.....	1,000-mile.....	36	850,000,000	170,000,000	170,000,000

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APPENDIX C.

The Akron, Canton & Youngstown Ry. Co.
 Alabama & Vicksburg Ry. Co.
 Alabama Great Southern R. R. Co.
 Ann Arbor R. R. Co.
 Arizona Eastern R. R. Co.
 The Atchison, Topeka & Santa Fe Ry. Co.
 Atlanta & West Point R. R. Co.
 Atlanta, Birmingham & Atlantic Ry. Co. and B. L. Bugg, receiver.
 Atlantic & St. Lawrence R. R. Co.
 Atlantic City R. R. Co.
 Atlantic Coast Line R. R. Co.
 Baltimore & Ohio R. R. Co.
 Baltimore, Chesapeake & Atlantic Ry. Co.
 Bangor & Aroostook R. R. Co.
 The Beaumont, Sour Lake & Western Ry. Co.

- Bessemer & Lake Erie R. R. Co.
- Bingham & Garfield Ry. Co.
- Boston & Albany R. R. Co. (the New York Central R. R. Co., lessee).
- Boston & Maine R. R.
- Buffalo & Susquehanna R. R. Corporation.
- Buffalo, Rochester & Pittsburgh Ry. Co.
- The Canadian Pacific Ry. Co. (lines in Maine).
- Carolina, Clinchfield & Ohio Ry.
- Central New England Ry. Co.
- Central of Georgia Ry. Co.
- The Central R. R. Co. of New Jersey.
- Central Vermont Ry. Co.
- Charleston & Western Carolina Ry. Co.
- The Chesapeake & Ohio Ry. Co.
- The Chicago & Alton R. R. Co. and William W. Wheelock and William G. Bierd, receivers.
- Chicago & Eastern Illinois Ry. Co.
- Chicago & Erie R. R. Co.
- Chicago & North Western Ry. Co.
- Chicago, Burlington & Quincy R. R. Co.
- Chicago, Detroit & Canada Grand Trunk Junction R. R. Co.
- Chicago Great Western R. R. Co.
- Chicago, Indianapolis & Louisville Ry. Co.
- Chicago, Milwaukee & St. Paul Ry. Co.
- Chicago, Peoria & St. Louis R. R. Co. and Bluford Wilson and Wm. Cotter, receivers.
- 71 The Chicago, Rock Island & Gulf Ry. Co.
- The Chicago, Rock Island & Pacific Ry. Co.
- Chicago, St. Paul, Minneapolis & Omaha Ry. Co.
- The Cincinnati, Indianapolis & Western R. R. Co.
- The Cincinnati, Lebanon & Northern Ry. Co.
- The Cincinnati, New Orleans & Texas Pacific Ry. Co.
- The Cincinnati Northern R. R. Co.
- The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.
- The Colorado & Southern Ry. Co.
- Columbus & Greenville R. R. Co. and A. T. Stovall, receiver.
- The Cumberland Valley & Martinsburg R. R. Co.
- The Delaware & Hudson Co.
- The Delaware, Lackawanna & Western R. R. Co.
- The Denver & Rio Grande Western R. R. Co. and Joseph H. Young, receiver.
- The Denver & Salt Lake R. R. Co. and W. R. Freeman and C. Boettcher, receivers.
- Detroit & Mackinac Ry. Co.
- Detroit & Toledo Shore Line R. R. Co.
- Detroit, Grand Haven & Milwaukee Ry. Co.
- Detroit, Toledo & Ironton R. R. Co.

- The Duluth & Iron Range R. R. Co.
- Duluth, Missabe & Northern Ry. Co.
- The Duluth, South Shore & Atlantic Ry. Co.
- Duluth, Winnipeg & Pacific Ry. Co.
- El Paso & Southwestern Co.
- Elgin, Joliet & Eastern Ry. Co.
- Erie R. R. Co.
- Florida East Coast Ry. Co.
- Fort Smith & Western R. R. Co. and Charles T. O'Neil, receiver.
- The Fort Worth & Denver City Ry. Co.
- Fort Worth & Rio Grande Ry. Co.
- The Galveston, Harrisburg & San Antonio Ry. Co.
- Georgia & Florida Ry. and John Skelton Williams, receiver.
- Georgia R. R.
- Georgia Southern & Florida Ry. Co.
- Grand Rapids & Indiana Ry. Co.
- Grand Trunk Western Ry. Co.
- 72 The Great Northern Ry. Co.
- Green Bay & Western R. R. Co.
- Gulf & Ship Island R. R. Co.
- Gulf, Colorado & Santa Fe Ry. Co.
- Gulf, Mobile & Northern R. R. Co.
- The Hocking Valley Ry. Co.
- Houston & Texas Central R. R. Co.
- The Houston East & West Texas Ry. Co.
- Illinois Central R. R. Co.
- International & Great Northern Ry. Co. and James A. Baker,
receiver.
- The Kanawha & Michigan Ry. Co.
- The Kansas City, Mexico & Orient R. R. Co. and Wm. T. Kemper,
receiver.
- Kansas City, Mexico & Orient Ry. Co. of Texas.
- The Kansas City Southern Ry. Co.
- Kansas, Oklahoma & Gulf Ry. Co.
- The Lake Erie & Western R. R. Co.
- Lake Superior & Ishpeming Ry. Co.
- The Lehigh & Hudson River Ry. Co.
- Lehigh & New England R. R. Co.
- Lehigh Valley R. R. Co.
- The Long Island R. R. Co.
- Los Angeles & Salt Lake R. R. Co.
- Louisiana & Arkansas Ry. Co.
- Louisiana Ry. & Navigation Co.
- Louisiana Western R. R. Co.
- Louisville & Nashville R. R. Co.
- Louisville, Henderson & St. Louis Ry. Co.
- Maine Central R. R. Co.
- Maryland, Delaware & Virginia Ry. Co.
- The Michigan Central R. R. Co.

Midland Valley R. R. Co.
 The Minneapolis & St. Louis R. R. Co.
 Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.
 Mississippi Central R. R. Co.
 Missouri, Kansas & Texas Ry. Co. and C. E. Schaff, receiver.
 The Missouri, Kansas & Texas Ry. Co. of Texas.
 Missouri Pacific R. R. Co.
 Mobile & Ohio R. R. Co.
 The Monongahela Ry. Co.
 Montour R. R. Co.

Morgan's Louisiana & Texas R. R. & S. S. Co.
 The Nashville, Chattanooga & St. Louis Ry.

The Nevada Northern Ry. Co.
 73 New Jersey & New York R. R. Co.
 New Orleans & Northeastern R. R. Co.

New Orleans Great Northern R. R. Co.
 New Orleans, Texas & Mexico Ry. Co.
 The New York Central R. R. Co.
 The New York, Chicago & St. Louis R. R. Co.
 New York Connecting R. R. Co.
 The New York, New Haven & Hartford R. R. Co.
 New York, Ontario & Western Ry. Co.
 New York, Susquehanna & Western R. R. Co.
 Norfolk & Western Ry. Co.
 Norfolk Southern R. R. Co.
 Northern Alabama Ry. Co.
 Northern Pacific Ry. Co.
 Northwestern Pacific R. R. Co.
 Oregon Short Line R. R. Co.
 Oregon-Washington R. R. & Navigation Co.
 Panhandle & Santa Fe Ry. Co.
 The Pennsylvania R. R. Co.
 Pere Marquette Ry. Co.
 Perkiomen R. R. Co.

Philadelphia & Reading Ry. Co.
 The Pittsburgh & Lake Erie R. R. Co.
 The Pittsburgh & Shawmut R. R. Co.
 The Pittsburgh & West Virginia Ry. Co.
 The Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co.
 The Pittsburgh, Shawmut & Northern R. R. Co. and Henry S.
 Hastings, receiver.

The Port Reading R. R. Co.
 Quincy, Omaha & Kansas City R. R. Co.
 Richmond, Fredericksburg & Potomac R. R. Co.
 Rutland R. R. Co.
 The St. Joseph & Grand Island Ry. Co.
 The St. Louis, Brownsville & Mexico Ry. Co.
 St. Louis-San Francisco Ry. Co.
 St. Louis, San Francisco & Texas Ry. Co.

St. Louis Southwestern Ry. Co.
 St. Louis Southwestern Ry. Co. of Texas.
 San Antonio & Aransas Pass Ry. Co.
 San Antonio, Uvalde & Gulf R. R. and A. R. Ponder, receiver.
 Seaboard Air Line Ry. Co.
 Southern Ry. Co.
 Southern Pacific Co.
 Spokane International Ry. Co.
 Spokane, Portland & Seattle Ry. Co.
 74 The Staten Island Rapid Transit Ry. Co.
 Tennessee Central Ry. Co.
 Texarkana & Fort Smith Ry. Co.
 Texas & New Orleans R. R. Co.
 The Texas & Pacific Ry. Co. and J. L. Lancaster and C. L. Wallace, receivers.
 The Toledo & Ohio Central Ry. Co.
 Toledo, Peoria & Western Ry. Co. and S. M. Russell, receiver.
 Toledo, St. Louis & Western R. R. Co. and W. L. Ross, receiver.
 The Trinity & Brazos Valley Ry. Co. and John A. Hulen, receiver.
 The Ulster & Delaware R. R. Co.
 Union Pacific R. R. Co.
 Utah Ry. Co.
 Vicksburg, Shreveport & Pacific Ry. Co.
 The Virginian Ry. Co.
 Wabash Ry. Co.
 West Jersey & Seashore R. R. Co.
 Western Maryland Ry. Co.
 The Western Pacific R. R. Co.
 The Western Ry. of Alabama.
 The Wheeling & Lake Erie Ry. Co.
 The Wichita Falls & Northwestern Ry. and C. E. Schaff, receiver.
 Wichita Valley R. R. Co.
 The Yazoo & Mississippi Valley R. R. Co.
 By the commission.

[SEAL.]

GEORGE M. MCGINTY,
Secretary.

75 *Exhibit D to petition.*

Interstate Commerce Commission.

No. 14104.

Interchangeable mileage ticket investigation.

Submitted February 23, 1923. Decided March 6, 1923.

Rules and regulations prescribed to govern the issuance and use of interchangeable scrip coupon ticket dealt with in the original report, 77 I. C. C., 200.

Appearances same as in original report.

SUPPLEMENTAL REPORT OF THE COMMISSION.

MEYER, Chairman:

In our original report, 77 I. C. C., 200, we found that on and after March 15, 1923, carriers by rail, respondents herein, enumerated in Appendix C of that report, shall establish, issue, and maintain at such offices as we may designate a nontransferable interchangeable scrip coupon ticket in the denomination of \$90, which shall be sold at a reduction of 20 per cent from the face value of the ticket, and that the rates resulting from that reduction will be just and reasonable for this class of travel. We further found that the scrip coupon ticket shall be good within one year from the date of its sale for carriage of passengers on all passenger trains operated by said respondents, except that in the case of special or extra-fare trains its use shall be subject to the payment by the passenger of the special or extra fare.

By request of the parties we deferred action on certain of the rules and regulations which shall govern the issuance and use of the scrip ticket so that they might confer. A conference was had, 76 at which an agreement was reached on all except three of the rules and regulations. The latter were made the subject of a further hearing. They relate to (a) the character of the identification which shall be required, (b) whether the scrip coupon ticket shall be good for carriage on all passenger trains upon presentation to conductors or shall be good only when such coupon ticket has been exchanged for a one-way or round-trip ticket, and (c) the baggage privileges to which the lawful holders of the tickets are entitled and whether the coupons shall be accepted by the respondents in payment of excess-baggage charges.

The rules proposed by respondents contemplate that in order to protect their revenues and to prevent scalping, the owner of the coupon ticket shall be required to identify himself by photograph and autograph. There is no disagreement among the parties with respect to the autograph requirement; but the commercial travelers, although unqualifiedly in favor of preventing improper use of the book, oppose the suggestion that a photograph also be required. Photographs for this purpose can be had at nominal cost in almost any city or town. An autograph requirement standing alone would not be sufficient to protect the nontransferability of the ticket. We find that the ticket should be protected by both photograph and autograph.

The second rule in dispute provides that coupons must be exchanged at ticket offices for one-way or round-trip tickets. This rule requires both a consideration of the law and of many practical problems. The law directs that carriers by rail subject to the interstate commerce act be required to establish, issue, and maintain mileage or scrip coupon tickets at just and reasonable rates, "good for passenger carriage upon the passenger trains of all carriers by rail

subject to this act." The law also provides that before making any order requiring the issuance of such tickets we shall, "make and publish such reasonable rules and regulations for their issuance and use as in its (our) judgment the public interest demands." Respondents say that the phrase "good for passenger carriage upon the passenger trains of all carriers by rail subject to this act," does not require that the coupons be honored by conductors on trains and that that provision of the law would be met under the rule which contemplates that, except at nonagency stations, or stations not open for the sale of tickets, coupons shall be exchanged for one-way or round-trip tickets.

Respondents' testimony indicates that the duty of collecting ordinary tickets in connection with the routine duty imposed upon each conductor of reporting train collections to the auditor occupies practically all of the time of the conductor not devoted to the safe and proper operation of his train; that the additional burden incident to the calculation of fares and the detachment of scrip will impede the conductor to an extent inconsistent with his responsibility for the safe and proper operation of the train; that it is unreasonable and impracticable to expect conductors to know or to be able to determine the fares to various points throughout the country; that if coupons must be honored on trains loss of revenue will result therefrom, as scrip is equivalent to cash to the line honoring it; that conductors have not adequate facilities to safeguard the scrip; that it would be impossible to prevent the scalping of tickets, and loss of revenue from that source; that their rule that coupons be exchanged at ticket offices is reasonable and that the inconvenience the rule might impose upon passengers in some instances is outweighed by the revenue and practical considerations referred to. Furthermore, a universal book good on practically all railroads throughout the United States is not comparable, in this respect, with the mileage books sold during prior years, which were honored in limited territories.

Where the destination of a passenger is a point beyond the run of the conductor it would usually be necessary as a practical matter for each conductor to detach coupons sufficient to cover only the fare over his run. In some instances that would result in the payment by the passenger of a higher through fare than would be the case if coupons had been exchanged for a regular through ticket. However, competition between the short and long route carriers would undoubtedly tend to minimize such instances.

Respondents stress the point that if they are required to honor coupons on trains it will be impossible to prevent abuse of the baggage privileges. They refer to the ease with which a person could check his baggage to a given point and then use some other kind of transportation. To the extent that that abuse would be possible it, of course, would result in the free transportation by the railroads of the baggage. While methods could undoubtedly be provided

which would minimize such abuse, it is apparent that it would be difficult for respondents successfully to police the baggage-checking privileges should they be required to honor coupons on trains.

The practical and revenue aspects of the situation appear to us to be of greater and of more controlling importance than the inconvenience to the passengers, under the rule that coupons must be exchanged for tickets, although when stations are crowded the inconvenience may be serious. In the light of these considerations, we

79 are convinced that, unless the law compels a different conclusion, respondents' rule should be approved. When read in connection with that part of the law which requires us to make and publish reasonable rules and regulations for the issuance and use of coupon tickets, we feel that the phrase "good for passenger carriage upon the passenger trains of all carriers by rail subject to this act" is susceptible of the construction placed upon it by respondents, and that it does not require that the coupon ticket, in the form in which issued, must necessarily be honored upon passenger trains in all circumstances.

Where a passenger boards a train at a nonagency station or at a station where tickets can not be purchased respondents' rule provides that coupons will be good for carriage on trains only to the terminus of the run of the first conductor, and that if the destination of the passenger be a point beyond, the passenger must leave the train and exchange coupon for a ticket. We think in such circumstances respondents' proposed rule is unreasonable. It should be optional with the passenger to leave the train to exchange coupons for a ticket or to remain on the train, in which latter event the succeeding conductor or conductors should honor the coupons. With that exception we find that respondents' rule, that coupons shall be exchanged at ticket offices for one-way or round-trip tickets, is reasonable. In *In re Mileage Books*, 28 I. C. C., 318, we found a similar rule not unjustly discriminatory or otherwise in violation of the act.

Respondents' rule with respect to baggage provides that, with the exception of passengers who board trains at nonagency stations, baggage will not be checked except on presentation of a one-way ticket, issued in exchange for scrip. With this condition complied

80 with baggage will be checked free up to 150 pounds, regardless of the starting point or destination of passenger. Under respondents' rules excess-baggage charges must be paid in cash. Commercial travelers urge that respondents should accept coupons in payment of excess-baggage charges. No good reason appears why the holder of this form of ticket should not be required to pay such charges in cash. We find that respondents' rule with respect to baggage is reasonable.

Respondents' rules provide that the scrip tickets shall be sold at principal stations on lines of issuing and initial carriers shown in tariffs, and that to obtain scrip tickets at the less important stations the person intending to purchase such a ticket must give the agent at such points at least three days' advance notice, ex-

clusive of Sundays and holidays. The phrase "principal stations" means stations at which interline tickets are ordinarily sold. As thus defined, there was no disagreement with respect to this rule. We find it to be reasonable.

Among the rules and regulations proposed by respondents are two which provide (a) that where the Federal or State Governments elect to take advantage of the scrip tickets no further reduction will be accorded under the land-grant laws, appropriation acts, or State statutes for the transportation of officers and enlisted men of the United States Army or Navy, or of the State National Guard, or other persons identified with the Federal or State military establishments; and (b) that scrip books will not be issued in lieu of Federal or State transportation requests or other nonnegotiable paper. We do not give our assent to these rules, because they present questions which, in our judgment, can be dealt with more effectively by negotiation between the railroads and the appropriate departments of the Federal and State Governments.

81 Under the act as amended we are authorized to exempt from its provisions "either in whole or in part any carriers where the particular circumstances shown to the commission shall justify such exemption to be made." The findings of our original report are applicable to carriers by rail enumerated in Appendix C thereof. We have since given this question further consideration. We find that the particular circumstances shown justify the exemption of the following carriers: Bingham & Garfield Railway Company; The Kansas City, Mexico & Orient Railroad Company and Wm. T. Kemper, receiver; Kansas City, Mexico & Orient Railway Company of Texas; Lehigh & New England Railroad Company; Utah Railway Company; The Nevada Northern Railway; San Antonio, Uvalde & Gulf Railroad and A. R. Ponder, receiver; The Ulster & Delaware Railroad Company; Elgin, Joliet & Eastern Railway Company; and the Canadian Pacific Railway Company lines in Maine.

Testimony introduced by respondents indicates that it will be physically impossible for them to publish tickets and put them on sale at ticket offices by March 15. They request that we allow them until May 1.

We find and conclude that on and after May 1, 1923, respondents hereinbefore described shall be governed in the issuance and use of the scrip coupon ticket prescribed by us in our original report by the rules and regulations in Appendix D, which we find will be just and reasonable.

An appropriate order will be entered.

Commissioners Hall, Daniels, and Potter dissent.

82 APPENDIX D TO SUPPLEMENTAL REPORT—RULES AND REGULATIONS.

RULE 1. Stations at which interchangeable scrip books are on sale:
(a) At principal stations on lines of the issuing and initial carriers shown herein: To obtain scrip books at minor stations intending purchaser must give agent at least three days' advance notice, exclusive of Sundays and holidays.

(b) Scrip books will be honored under conditions provided herein for local and interline trips over the lines of the issuing and participating carriers named on pages — to —.

NONTRANSFERABLE INTERCHANGEABLE SCRIP BOOKS.

RULE 2. Description of scrip books:

Nontransferable interchangeable scrip books (Form I. S.), each containing eighteen hundred (1,800) coupons of the face value of five (5) cents each, which may be used in exchange for first-class transportation at the charges and under the regulations set forth herein, will be sold at principal ticket offices. The scrip book will consist of a photographic signature-witnessed contract, coupons and cover, each bearing the name or initials of the issuing carrier and the same form and consecutive serial number.

RULE 3. Individual use and conditions of sale:

Scrip books will be good only for use by the individual to whom issued and only when the following conditions of issue and sale have been complied with:

83 (a) When the book bears the photograph of the person for whose exclusive use it is issued. An unmounted photograph, approximately one and one-half inches wide by one and three-fourths inches long, printed on thin paper, showing the head and shoulder likeness of the purchaser and sufficiently plain for the purpose of identification, must be furnished by purchaser and must be pasted by ticket agent in space provided for that purpose. Photographs on cardboards or post cards will not be accepted.

(b) When the person to whom issued has affixed his or her signature thereto in ink, in presence of an agent of the issuing carrier at time of sale. If the purchaser be a woman, agent will require her to sign her name in full, using her Christian or given name. Married women must be required to affix their full names to scrip books, for the purpose of identification; for example, the wife of William Smith, whose given name is Mary J. Smith, should not sign her name as Mrs. Wm. Smith, but as Mary J. Smith.

(c) When book is officially stamped, limited, and signed by selling agent.

(d) The name, business occupation, and residence of purchaser must be written in ink by selling agent in space provided therefor on agent's stub and auditor's stub.

(e) Identification of the holder of a scrip book or an exchange passage ticket must be established, by signature and otherwise, to the satisfaction of any agent or conductor or collector, whenever requested.

(f) Nontransferrable: If a scrip book be presented to any agent, conductor, or collector for the transportation of any person
84 other than the person whose name is signed to the contract of the scrip book and whose photograph is affixed thereto, it will not be honored but will be forfeited, and any such agent, conductor,

or collector will confiscate such scrip book, and collect lawful tariff fare.

(g) If any of the conditions or stipulations governing the use of an interchangeable scrip book (Form I. S.) are not complied with the scrip book shall thereby become void, and the person to whom issued forfeits all rights thereto, and all sums of money paid therefor.

(h) The Federal law providing for the sale of scrip books prescribes the following penalty: " * * * Any person who shall wilfully offer for sale or carriage any such ticket contrary to the said rules and regulations shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not to exceed \$1,000."

RULE 4. Alterations:

If any scrip book bears any alteration or erasure, or if more than one date be punched in margin, it will be void and will be confiscated by any agent, conductor, or collector of any carrier.

RULE 5. Responsibility:

A carrier selling a scrip book, or issuing an exchange passage ticket, acts only as agent for participating carriers and is not responsible beyond its own line.

RULE 6. Charge for scrip books:

Scrip books of face value of ninety dollars (\$90.00) will be sold for seventy-two dollars (\$72.00) each. No reduction for children.

85 RULE 7. Limit for scrip book:

One year from date of sale, after which scrip book will be void. (See Rule 17-b.)

Method of obtaining transportation on scrip books.

RULE 8. Exchange at ticket offices:

Coupons of scrip books must be exchanged at ticket offices as follows:

(a) For one-way tickets on basis of normal one-way adult first-class fares as published in tariffs of carriers parties lawfully filed.

(b) For round-trip tickets on basis of double the normal way adult first-class fares where tariffs of the carriers parties hereto lawfully filed provide for sale of round-trip tickets at double one-way fares.

(c) Collections for scrip books should be advanced or reduced to end in 0 or 5: Agents, conductors, and collectors in making detachments from scrip books when one-way or double one-way tariff fare does not end in 0 or 5 should, where it ends in 3 or 4 or 8 or 9, advance the one-way or double one-way tariff fare to end in 0 or 5, but where the fare ends in 1 or 2 or 6 or 7 the detachment should be reduced to the nearest 0 or 5.

(d) Scrip books will not be honored in exchange for the following:

One-way tickets sold at reduced fares.

One-way nonbaggage suburban fares.

Round-trip tickets sold at reduced fares.

Extra-fare charges on extra-fare trains.

86 One-way tickets issued as part of round-trip transportation for which reduced fares on certificate plan are authorized.

Commutation tickets.

Excess-baggage or other baggage charges.

Immigrant tickets.

Inland proportional fares applying between Atlantic and Pacific ports on traffic between Europe and the Orient and Australasia.

Inland proportional fares applying between Atlantic, Pacific, and Gulf ports on traffic between Cuba and China.

Nor for any service or charge other than for one-way tickets on basis of normal one-way adult first-class fares or round-trip tickets on basis of double normal one-way adult first-class fares as specified above.

(e) Sleeping or parlor car tickets must not be issued by agents on scrip books but only on presentation of exchange passage tickets accompanied by scrip books. Under no circumstances will scrip books be honored on trains except as specified in rule 9 following:

RULE 9. Honoring scrip books from nonagency stations or stations not open for the sale of tickets:

Where passengers board trains at nonagency stations or at stations not open for the sale of tickets, scrip books will be honored on train for one-way passage within the run of the initial conductor or collector. Scrip coupons will also be accepted for transportation beyond the run of first conductor or collector on the train upon which the passenger first takes passage. Conductor or collector, when

87 honoring scrip coupons, will endorse on back thereof the names or numbers of the stations between which such scrip coupons are honored.

RULE 10. Minimum detachment from scrip books shall be ten (10) cents.

RULE 11. Detached scrip coupons will not be honored by any carrier.

RULE 12. Insufficient coupons to cover journey:

In the event the scrip coupons attached to one book be not sufficient to pay for an exchange passage ticket to destination of passenger, such coupons will be accepted at face value in part payment for an exchange passage ticket to such destination, the remainder of the fare to be paid in cash or in scrip coupons from another book or books of Form I. S. issued to the same person, except that cash will not be accepted in part payment in any case in which the standard one-way fare is \$90 or greater. When cash is collected by the agent to make up the difference in the fare account of insufficient scrip the amount of cash must be also endorsed on stub, contract, and initial coupon of exchange passage ticket thus "\$—— cash." The same method will apply when scrip books containing insufficient coupons are presented to conductors or collectors on trains for passage under conditions as outlined in rule 8. When conductors or

collectors make cash collections in connection with insufficient scrip they must issue cash-fare receipt for the amount of cash collected.

RULE 13. Scrip-book cover must be presented on train:

Each scrip book from which coupons have been detached in payment for an exchange passage ticket must be presented to conductors or collectors together with such exchange passage ticket when the latter is presented for passage.

88 **RULE 14.** Disposition of covers:

When the last coupon of any scrip book is detached by ticket agent the cover of such book must ~~be~~ left in the hands of the passenger to be presented together with the exchange passage ticket to conductors or collectors. The last conductor or collector honoring exchange ticket will in every case lift, cancel, and forward to the auditor with his collections the empty cover of scrip book.

Issuing and honoring exchange passage tickets.

The following rules will govern the issuing and use of exchange passage tickets:

RULE 15. Exchange passage tickets:

(a) Form of tickets: When special printed forms of exchange passage tickets are not in stock, agents should use regular forms of one-way tickets (or round-trip tickets sold at double one-way fare), such tickets to be plainly endorsed or punched "Scrip" on contract and each coupon, and also marked or punched as indicated in paragraph (b) hereof.

(b) Endorsing tickets: Exchange passage tickets must be plainly printed, punched, or marked with office pen and ink or rubber stamp "Scrip" on contract and each coupon and the number (or numbers) of the scrip book, or books, on which such ticket is issued must also be marked in office pen and ink on contract and each coupon thus: "—— R. R., I. S. No. ——." When cash is collected by agent to make up the difference in fare account of insufficient scrip the amount of cash must be also endorsed on stub, contract, and initial coupon of exchange passage ticket thus "\$—— cash."

89 (c) Nontransferable; If an exchange passage ticket be presented to any agent, conductor, or collector for the transportation of any person other than the person whose name is signed to the contract of the scrip book and whose photograph is affixed thereto, it will not be honored but will be forfeited, and any such agent, conductor, or collector will confiscate such exchange ticket together with the scrip book and collect lawful tariff fare.

(d) Alterations: If any exchange ticket bears any alteration or erasure, or if more than one date be punched in margin, it will be void and will be confiscated by any agent, conductor, or collector of any carrier over which it is routed.

(e) Class of tickets: Exchange passage tickets will be good for first-class passage.

(f) Signature tickets: Exchange passage tickets reading from points east of Ogden, Salt Lake City, Albuquerque, or El Paso,

reading to California, also through California to points in British Columbia, Oregon, and Washington, or in the reverse direction, must be signed by purchaser with office pen and ink in presence of the selling agent. If the purchaser be a woman, agent will require her to sign her name in full, using her Christian or given name. Married women must be required to affix their full names to exchange passage tickets, for the purpose of identification; for example, the wife of William Smith, whose given name is Mary J. Smith, should not sign her name as Mrs. Wm. Smith, but as Mary J. Smith.

RULE 16. Exchange passage tickets not accepted unless scrip book is also presented:

Exchange passage tickets will not be honored for passage
90 nor for checking of baggage unless presented together with the cover of scrip book, or covers of scrip books, in exchange for coupons for which such passage tickets were issued.

RULE 17. Children:

No detachment less than full adult fare will be made.

RULE 18. Limits:

(a) Tickets issued in exchange for scrip coupons must be limited in accordance with limits shown in tariffs quoting fares used in making detachments. Agents will designate on each ticket by punch cancellation or otherwise the date to which such ticket is limited. Tickets must be used to destination not later than midnight of date to which ticket is limited. After midnight of date punched or endorsed on ticket it will not be good for passage.

(b) Tickets issued in exchange for scrip coupons will in no case be limited beyond the date of the expiration of the scrip books in exchange for which issued.

RULE 19. Stop-overs:

Stop-overs will be allowed as authorized in Local, Interdivision, and Joint Passenger Tariff——, I. C. C. ——, issued by——, agent, supplements thereto or new issues thereof, and in the tariffs of the carriers parties hereto as lawfully filed.

RULE 20. Routes:

Tickets issued in exchange for scrip coupons will be routed via lines of issuing, initial, and participating carriers shown herein in accordance with routes shown in tariffs quoting fares used in
91 making detachments. Exchange passage tickets must not be routed over lines not shown as participating carriers herein.

RULE 21. General privileges:

Except as otherwise specifically provided herein. holders of scrip books and exchange passage tickets issued under this tariff will be entitled to such optional routes, side trips, extension of limits account illness, washouts, etc., and other privileges as may be provided in the tariffs of the carriers parties hereto lawfully filed.

RULE 22. Transfers:

When fare used in making detachment from scrip book (as shown in tariff lawfully filed) includes transfer of passenger or baggage, or both, at junction points, and the tariff so indicates, the exchange

passage ticket will correspondingly include transfer of passenger or baggage, or both, at such points. When tariff provides for additional collections account transfer charges for passengers or baggage, or both, holder of exchange passage ticket must be required to pay such transfer charges in cash.

Baggage regulations.

RULE 23. Baggage regulations:

(a) Baggage will be checked in accordance with rules and regulations contained in Local, Interdivision, and Joint Baggage Tariff —, I. C. C. No. —, issued by —, agent, supplements thereto or new issues thereof, only upon presentation of exchange passage tickets, together with the scrip books described in said passage tickets, except that scrip coupons undetached from a scrip
92 book will be honored by conductors or collectors on trains for transportation of authorized allowance of baggage from a non-agency station, or from an agency station not open for the sale of tickets, but baggage will not be checked on scrip coupons beyond the run of the conductor. If the final destination of passenger be a point beyond the run of conductor of train upon which the initial passage is taken the succeeding conductor or conductors shall recheck the baggage to the terminus of their respective runs.

(b) The privilege of transportation of baggage from an agency station open for the sale of tickets, attaches only to an exchange passage ticket when presented in connection with a scrip book and then only when the baggage offered for transportation is carried by the passenger to whom such scrip book and exchange passage ticket belong.

(c) The excess-weight rates, excess-valuation rates, and all other rates, charges, rules and regulations relative to the transportation of baggage, as published in Joint Baggage Tariff —, I. C. S. No. —, issued by —, agent, supplements thereto or new issues thereof, apply to the transportation of baggage presented by the owners of scrip books, except that such books will not be accepted in payment of baggage charges of any character.

(d) The maximum free allowance of baggage which may be checked on exchange passage tickets will be 150 pounds regardless of starting point or destination of passenger.

93 Redemption of scrip books (Form I. S.) and exchange passage tickets.

Wholly unused or partially used scrip books or exchange passage tickets will be redeemed by the issuing carrier on the following basis if presented within eighteen (18) months from date of issue:

RULE 24. Scrip books:

Wholly unused scrip books will be redeemed at the price paid therefor, i. e., \$72.00.

Partially used scrip books will be redeemed (a) by deducting the total face value of the coupons detached and used from the purchase price of the book, i. e., seventy-two dollars (\$72.00), refunding the difference; (b) if coupons of face value of seventy-two dollars (\$72.00) or more have been detached and used, the remaining coupons will have no redemption value; (c) scrip books will be redeemed only by the issuing carrier:

RULE 25. Exchange passage tickets:

Wholly unused or partially used exchange tickets will not be redeemed in cash, but will be redeemed by the issuing carrier only by issue of redemption scrip of value equal to the redemption value of said ticket, to be honored in connection with the original scrip book and within the limit of said book. If the original book has been surrendered, a new book with coupons of value equal to the unused exchange passage ticket bearing same limitation as original book will be issued.

RULE 26. Scrip books and exchange passage tickets:

Identification: The person presenting for redemption an unused or partially used scrip book or exchange passage ticket must
94 be identified as the original purchaser of the scrip book to the satisfaction of the officer or agent to whom the application for redemption is presented.

RULE 27:

Scrip books will not be bulletined or duplicated if lost, mislaid, or stolen, nor will any refund be made on such account; nor if the book is subsequently located will the limit thereof be extended, nor will any exception be made to the plan of redemption hereinbefore stated.

ORDER.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of March, A. D. 1923.

No. 141040.

Interchangeable mileage ticket investigation.

It appearing that on January 26, 1923, the commission entered its report in the above-entitled proceeding, containing its findings of fact and conclusions thereon, and further hearing having been had with respect to the rules and regulations which shall govern the issuance and use of the interchangeable scrip coupon ticket described in said report; and the commission having, on the date hereof, made and filed its supplemental report containing its further findings of fact and conclusions thereon, which report and the said report of January 26, 1923, are hereby referred to and made a part hereof:

95 It is ordered that the respondents hereinafter named be, and they are hereby, notified and required to establish, issue, maintain, and, on and after May 1, 1923, keep in force, upon notice

to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, a nontransferable interchangeable scrip coupon ticket in the denomination of \$90, which shall be sold at a reduction of 20 per cent from the face value of the ticket, good within one year from the date of its sale for the carriage of passengers on all passenger trains operated by said respondents, except that in the case of special or extra-fare trains its use shall be subject to the payment in cash by the passenger of the special or extra fare, and except in so far as hereinafter specifically exempted:

- The Akron, Canton & Youngstown Ry. Co.
- Alabama & Vicksburg Ry. Co.
- Alabama Great Southern R. R. Co.
- Ann Arbor R. R. Co.
- Arizona Eastern R. R. Co.
- The Atchison, Topeka & Santa Fe Ry. Co.
- Atlanta & West Point R. R. Co.
- Atlanta, Birmingham & Atlantic Ry. Co. and B. L. Bugg, receiver.
- Atlantic & St. Lawrence R. R. Co.
- Atlantic City R. R. Co.
- Atlantic Coast Line R. R. Co.
- The Baltimore & Ohio R. R. Co.
- Baltimore, Chesapeake & Atlantic Ry. Co.
- Bangor & Aroostook R. R. Co.
- The Beaumont, Sour Lake & Western Ry. Co.
- Bessemer & Lake Erie R. R. Co.
- Boston & Albany R. R. Co. (The New York Central R. R. Co., lessee).
- Boston & Maine R. R.
- Buffalo & Susquehanna R. R. Corporation.
- Buffalo, Rochester & Pittsburgh Ry. Co.
- Carolina, Clinchfield & Ohio Ry.
- Central New England Ry. Co.
- Central of Georgia Ry. Co.
- The Central R. R. Co. of New Jersey.
- 96 Central Vermont Ry. Co.
- Charleston & Western Carolina Ry. Co.
- The Chesapeake & Ohio Ry. Co.
- The Chicago & Alton R. R. Co. and William W. Wheelock and William G. Bierd, receivers.
- Chicago & Eastern Illinois Ry. Co.
- Chicago & Erie R. R. Co.
- Chicago & North Western Ry. Co.
- Chicago, Burlington & Quincy R. R. Co.
- Chicago, Detroit & Canada Grand Trunk Junction R. R. Co.
- Chicago Great Western R. R. Co.
- Chicago, Indianapolis & Louisville Ry. Co.
- Chicago, Milwaukee & St. Paul Ry. Co.
- Chicago, Peoria & St. Louis R. R. Co. and Bluford Wilson and Wm. Cotter, receivers.
- The Chicago, Rock Island & Gulf Ry. Co.

- The Chicago, Rock Island & Pacific Ry. Co.
- Chicago, St. Paul, Minneapolis & Omaha Ry. Co.
- The Cincinnati, Indianapolis & Western R. R. Co.
- The Cincinnati, Lebanon & Northern Ry. Co.
- The Cincinnati, New Orleans & Texas Pacific Ry. Co.
- The Cincinnati Northern R. R. Co.
- The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.
- The Colorado & Southern Ry. Co.
- Columbus & Greenville R. R. Co. and A. T. Stovall, receiver.
- The Cumberland Valley & Martinsburg R. R. Co.
- The Delaware & Hudson Co.
- The Delaware, Lackawanna & Western R. R. Co.
- The Denver & Rio Grande Western R. R. Co. and Joseph H. Young, receiver.
- The Denver & Salt Lake R. R. Co. and W. R. Freeman and C. Boettcher, receivers.
- Detroit & Mackinac Ry. Co.
- Detroit & Toledo Shore Line R. R. Co.
- Detroit, Grand Haven & Milwaukee Ry. Co.
- Detroit, Toledo & Ironton R. R. Co.
- The Duluth & Iron Range R. R. Co.
- Duluth, Missabe & Northern Ry. Co.
- The Duluth, South Shore & Atlantic Ry. Co.
- Duluth, Winnipeg & Pacific Ry. Co.
- 97 El Paso & Southwestern Co.
- Erie R. R. Co.
- Florida East Coast Ry. Co.
- Fort Smith & Western R. R. Co. and Charles T. O'Neil, receiver.
- The Fort Worth & Denver City Ry. Co.
- Fort Worth & Rio Grande Ry. Co.
- The Galveston, Harrisburg & San Antonio Ry. Co.
- Georgia & Florida Ry. and John Skelton Williams, receiver.
- Georgia R. R.
- Georgia Southern & Florida Ry. Co.
- Grand Rapids & Indiana Ry. Co.
- Grand Trunk Western Ry. Co.
- The Great Northern Ry. Co.
- Green Bay & Western R. R. Co.
- Gulf & Ship Island R. R. Co.
- Gulf, Colorado & Santa Fe Ry. Co.
- Gulf, Mobile & Northern R. R. Co.
- The Hocking Valley Ry. Co.
- Houston & Texas Central R. R. Co.
- The Houston East & West Texas Ry. Co.
- Illinois Central R. R. Co.
- International & Great Northern Ry. Co. and James A. Baker, receiver.
- The Kanawha & Michigan Ry. Co.
- The Kansas City Southern Ry. Co.
- Kansas, Oklahoma & Gulf Ry. Co.
- The Lake Erie & Western R. R. Co.

Lake Superior & Ishpeming Ry. Co.
 The Lehigh & Hudson River Ry. Co.
 Lehigh Valley R. R. Co.
 The Long Island R. R. Co.
 Los Angeles & Salt Lake R. R. Co.
 Louisiana & Arkansas Ry. Co.
 Louisiana Ry. & Navigation Co.
 Louisiana Western R. R. Co.
 Louisville & Nashville R. R. Co.
 Louisville, Henderson & St. Louis Ry. Co.
 Maine Central R. R. Co.
 Maryland, Delaware & Virginia Ry. Co.
 The Michigan Central R. R. Co.
 Midland Valley R. R. Co.
 The Minneapolis & St. Louis R. R. Co.
 Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.
 98 Mississippi Central R. R. Co.
 Missouri, Kansas & Texas Ry. Co. and C. E. Schaff,
 receiver.
 The Missouri, Kansas & Texas Ry. Co. of Texas.
 Missouri Pacific R. R. Co.
 Mobile & Ohio R. R. Co.
 The Monongahela Ry. Co.
 Montour R. R. Co.
 Morgan's Louisiana & Texas R. R. & S. S. Co.
 The Nashville, Chattanooga & St. Louis Ry.
 New Jersey and New York R. R. Co.
 New Orleans & Northeastern R. R. Co.
 New Orleans Great Northern R. R. Co.
 New Orleans, Texas & Mexico Ry. Co.
 The New York Central R. R. Co.
 The New York, Chicago & St. Louis R. R. Co.
 New York Connecting R. R. Co.
 The New York, New Haven & Hartford R. R. Co.
 New York, Ontario & Western Ry. Co.
 New York, Susquehanna & Western R. R. Co.
 Norfolk & Western Ry. Co.
 Norfolk Southern R. R. Co.
 Northern Alabama Ry. Co.
 Northern Pacific Ry. Co.
 Northwestern Pacific R. R. Co.
 Oregon Short Line R. R. Co.
 Oregon-Washington R. R. & Navigation Co.
 Panhandle & Santa Fe Ry. Co.
 The Pennsylvania R. R. Co.
 Pere Marquette Ry. Co.
 Perkiomen R. R. Co.
 Philadelphia & Reading Ry. Co.
 The Pittsburgh & Lake Erie R. R. Co.

The Pittsburgh & Shawmut R. R. Co.
 The Pittsburgh & West Virginia Ry. Co.
 The Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co.
 The Pittsburg, Shawmut & Northern R. R. Co. and Henry S. Hastings, receiver.

The Port Reading R. R. Co.
 Quincy, Omaha & Kansas City R. R. Co.
 Richmond, Fredericksburg & Potomac R. R. Co.
 Rutland R. R. Co.
 The St. Joseph & Grand Island Ry. Co.
 The St. Louis, Brownsville & Mexico Ry. Co.
 St. Louis-San Francisco Ry. Co.
 St. Louis, San Francisco & Texas Ry. Co.
 99 St. Louis Southwestern Ry. Co.
 St. Louis Southwestern Ry. Co. of Texas.

San Antonio & Arkansas Pass Ry. Co.
 Seaboard Air Line Ry. Co.
 Southern Ry. Co.
 Southern Pacific Co.
 Spokane International Ry. Co.
 Spokane, Portland & Seattle Ry. Co.
 The Staten Island Rapid Transit Ry. Co.
 Tennessee Central Ry. Co.
 Texarkana & Fort Smith Ry. Co.
 Texas & New Orleans R. R. Co.
 The Texas & Pacific Ry. Co. and J. L. Lancaster and C. L. Wallace, receivers.

The Toledo & Ohio Central Ry. Co.
 Toledo, Peoria & Western Ry. Co. and S. M. Russell, receiver.
 Toledo, St. Louis & Western R. R. Co. and W. L. Ross, receiver.
 The Trinity & Brazos Valley Ry. Co. and John A. Hulen, receiver.
 Union Pacific R. R. Co.
 Vicksburg, Shreveport & Pacific Ry. Co.
 The Virginia Ry. Co.
 Wabash Ry. Co.
 West Jersey & Seashore R. R. Co.
 Western Maryland Ry. Co.
 The Western Pacific R. R. Co.
 The Western Ry. of Alabama.
 The Wheeling & Lake Erie Ry. Co.
 The Wichita Falls & Northwestern Ry. and C. E. Schaff, receiver.

Wichita Valley R. R. Co.

The Yazoo & Mississippi Valley R. R. Co.

It is further ordered, That the issuance and use of said interchangeable scrip coupon ticket shall be governed by the rules and regulations set out in Appendix D to said supplemental report.

It is further ordered, That the respondents hereinafter named be, and they are hereby, exempted from the provisions of the said

amendatory act as to the branches and parts of lines named and described, viz:

100 The Virginian Railway Company: Maine line west of Roanoke, Va.; all branch lines in West Virginia.

Florida East Coast Railway Company: Key West extension south of Homestead, Fla.

Boston & Maine Railroad: Orchard Beach branch, extending from Old Orchard to Camp Ellis, Me., a distance of 3.8 miles; branch from Fabyan to Mount Washington, N. H., a distance of 6.7 miles; Bethlehem branch, extending from Bethlehem Junction to Bethlehem, N. H., a distance of 3.4 miles.

Mobile & Ohio Railroad Company: Okolona branch of the Southern Railway Company (operated by the Mobile & Ohio), extending from Okolona to Calhoun City, Miss., 37.7 miles.

It is further ordered, That all respondent common carriers by rail not hereinbefore named and described be, and they are hereby, exempted from the provisions of the aforesaid amendatory act.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission.

[SEAL.]

GEORGE B. MCGINTY,
Secretary.

101 TRANSCRIPT OF RECORD OF DISTRICT COURT.

UNITED STATES OF AMERICA,
District of Massachusetts, ss.:

At a District Court of the United States within and for the District of Massachusetts, begun and holden at Boston, on the third Tuesday of March, being the twentieth day of March, in the year of our Lord one thousand nine hundred and twenty three.

Before The Honorable James M. Morton, jr., district judge.

[Title omitted.]

The petition in this cause is filed in the clerk's office on the thirtieth day of March, A. D. 1923, and is duly entered at the present March term of this court, A. D. 1923, and is in the words and figures following:

102 In United States District Court.

Petition.

Filed March 30, 1923.

(MEMORANDUM.—The petition, as printed in this Transcript of Record, beginning on page 3, is here inserted. James S. Allen, clerk.)

On the tenth day of April, A. D. 1923, the following motion for leave to file petition to intervene is filed by the National Council of Travelling Salesmen's Association:

In United States District Court.

Motion for leave to file petition to intervene.

Filed April 10, 1923.

To the Honorable the Judges of the District Court of the United States for the District of Massachusetts:

Now come the National Council of Traveling Salesmen's Associations, an unincorporated association of more than seven members, and Aaron M. Loeb, as president; Samuel H. Liberman, as first vice president; Leon S. Fox, as second vice president; Selden A. McOmber, as third vice president; George W. Allen, as fourth vice president; Sol Wolerstein, as secretary; and Archie E. Foise, as treasurer thereof; and Garment Salesmen's Association, Inc., by Powers & Hall, Samuel Blumberg, and Hoke Smith, their solicitors, and move the court for leave to file herein their intervening petition herewith submitted for the reason that they were and are interested in the controversy and question before the Interstate Commerce Commission to which this suit refers, and in the subject matter of this suit, as in said intervening petition more particularly set out and specified.

By POWERS & HALL,
JAMES N. CLARK,
SAMUEL BLUMBERG,
HOKE SMITH,

*Solicitors for National Council of Traveling
Salesmen's Associations et al., Interventors.*

On the same day, the foregoing motion is allowed by the court, the Honorable George F. Morris, district judge for the District of New Hampshire, duly assigned to hold said District Court, sitting, and the following petition to intervene is filed:

103

In United States District Court.

*Petition of the National Council of Traveling Salesmen's Association
to Intervene et al.*

Filed April 10, 1923.

*To the Honorable Judges of the District Court of the United States
for the District of Massachusetts:*

The petition to intervene of the National Council of Traveling Salesmen's Associations, an unincorporated association, and of Aaron M. Loeb, as president; Samuel H. Liberman, as first vice president;

Leon S. Fox, as second vice president; George W. Allen, as fourth vice president; Sol Wolerstein, as secretary; Archie E. Foise, as treasurer thereof; and the Garment Salesmen's Association, Inc., respectfully show:

1. This petition to intervene is made under the provisions of the interstate commerce act and an act of October 22nd, 1913, entitled "An act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913 and for other purposes," and under the Judicial Code, and more particularly section 212 thereof, and likewise under all other statutory provisions applicable thereto and the general equity jurisdiction of this court.

2. Your petitioner, National Council of Traveling Salesmen's Associations, is an unincorporated association of more than seven members, with its principal office in the city, county, and State of New York, comprising the following constituent bodies:

Associated Traveling Salesmen of New York, Inc.; Associated Chicago Salesmen; Associated Millinery Men, Inc.; Associated Millinery Traveling Salesmen, Incorporated; Boot & Shoe Travelers' Association of New York; Carpet & Upholstery Club of Chicago; Chicago Corset Salesmen's Club; Cincinnati Traveling Men's Association; Cleveland Garment Salesmen's Association; Commercial Travelers' Association of the Lace, Embroidery, and Allied Trades, Inc.; Eastern and Middle West Travelers' Association, Inc.; Empire State Corset Club; Far Western Travelers' Association, Inc.; Garment Salesmen's Association, Inc.; Jewelry, Leather, and Fancy Goods Salesmen's Association, Inc.; Men's Apparel Club of New Jersey; Men's Apparel Club of the State of New York, Inc.; Men's Apparel Club of Pennsylvania, Incorporated; Men's Apparel Club of Michigan; National Association of Knit Goods Selling Agents; National Piano Travelers' Association; New England Corset Club; Ohio Corset Club; Pennsylvania Corset Club; Salesmen's Association of the Paper Industry; Silk Travelers' Association, Inc.; Southern Jewelry Travelers' Association, Incorporated; Southern Travelers' Association, Inc.; Southern Shoe Salesmen's Association; Tobacco Salesmen's Association of America, Inc.; Upholstery Association of America, Inc.; and Wall-Paper Travelers' Association, all of which are members of said National Council in good standing.

Your petitioners, Aaron M. Loeb, Samuel H. Liberman, Leon S. Fox, Selden A. McOmber, George W. Allen, Sol Wolerstein, and Archie E. Foise are the president, first vice president, second vice president, third vice president, fourth vice president, secretary, and treasurer, respectively, of your said petitioner, National Council of Traveling Salesmen's Associations.

Your petitioner, Garment Salesmen's Association, Inc., is a corporation of the State of New York, and is one of the members above named of your said petitioner, National Council of Traveling Salesmen's Associations.

Your petitioner file this petition to intervene both for themselves and for and as representing the afore-mentioned constituent bodies and members of your said petitioner, National Council of Traveling Salesmen's Associations.

3. Section 22 of the interstate commerce act was amended by an act of Congress of August 18th, 1922, so as to add two (2) paragraphs to the said section, so that said section thereafter and now reads as set forth in "Exhibit A" of the petition of the carriers herein heretofore filed, which said "Exhibit A" is made a part hereof as if set forth at length. Pursuant to the provisions of said section as so amended the said commission on August 23rd, 1922, made an order for an investigation, a copy of which said order is set forth in "Exhibit B" of the said petition of the carriers herein, which said "Exhibit B" is made a part hereof, as if set forth at length. Thereafter hearings were had before the said commission on September 26th and 27th and on November 15th, 1922, and thereafter, to wit, on January 26th, 1923, the said commission made its report and opinion, a copy of which, together with a copy of the dissenting opinions, is set forth in "Exhibit C" in the said petition of the carriers herein, which said "Exhibit C" is made part hereof as if set forth at length. On March 6th, 1923, the commission issued a further report and order, a copy of which is set forth in "Exhibit D" of the said petition of the carriers herein, which said "Exhibit D" is made part hereof as if set forth at length.

105 4. Your said petitioner, National Council of Traveling Salesmen's Associations, has always been one of the principal proponents of such legislation as hereinabove referred to, and of the purposes sought to be brought about by the said order of the Interstate Commerce Commission in pursuance thereof, hereinabove referred to. Your said petitioner on its own behalf, and that of its constituent bodies and of other associations, persons, firms, and corporations similarly situated, by its attorneys and solicitors, Samuel Blumberg and Hoke Smith, appeared at all hearings before committees of Congress, held for the purpose of adducing testimony in regard thereto, and consideration of, the said legislation theretofore proposed, and at all hearings of the Interstate Commerce Commission, held as above recited, did likewise appear, as shown by the appearances noted in the said report and opinion of the Interstate Commerce Commission aforementioned, and produced witnesses, introduced evidence, and made argument as to the said legislation and the action to be taken by the Interstate Commerce Commission in pursuance thereof, and at the said hearings and all of them before the Interstate Commerce Commission your petitioner's said attorneys and solicitors, Samuel Blumberg and Hoke Smith, conducted the said hearings, not only in behalf of your said petitioner, but also in behalf of all other parties appearing at the said hearings in favor of the issuance of an interchangeable scrip coupon ticket at reduced rates, and said Samuel Blumberg and Hoke Smith, in said

capacity, conducted the said hearings in their entirety in that behalf, and were the only attorneys and solicitors so conducting said hearings.

5. Your said petitioner, both on its own behalf and that of its constituent bodies and of other associations, persons, firms, and corporations similarly situated, has for years been an interested and active proponent of such reduction in rates in connection with the issuance of interchangeable mileage or scrip coupon books under such conditions as should be just and reasonable. The said constituent bodies comprising the membership of your said petitioner, and, through them, your said petitioner are composed of thousands of citizens of the United States, engaged in the occupation of market-

106 ing merchandise in all parts of the United States, and in so doing traveling to said parts of the United States on the roads of the carriers of this country, said citizens being commonly known as commercial travelers. In so marketing merchandise, and in so traveling for that purpose, said commercial travelers, members of your petitioner's constituent bodies, as aforementioned, as well as all other commercial travelers of the United States, not such members, in whose welfare and protection, as well, your said petitioner is interested, travel thousands of miles a year over the roads of the carriers of this country, and in particular of the carriers of the eastern group, petitioners in this action. Said commercial travelers have in the past, when mileage and scrip coupon books were issued, purchased carriage in large amounts under said books, and would in the future again purchase carriage in large amounts under the scrip coupon ticket ordered by the Interstate Commerce Commission. Their occupation and interests, in order that they may perform the duties of their said occupation to the fullest extent, and in order that they may market the merchandise of the country on a broad and complete scale, as same should be marketed, and in order that they may lay the commodities of the country before its consumers, and afford said consumers the opportunities of choice and purchase of said commodities to an extent which shall be proper and to the advantage of the industries, consumers, carriers, and general public of the country alike, require a reasonable and just reduction in the rate of travel, as ordered by the Interstate Commerce Commission, under the conditions by it prescribed.

6. Your petitioner, Garment Salesmen's Association, Inc., at all times authorized your petitioner, National Council of traveling Salesmen's Associations, to appear for it and to represent it before the various committees of Congress and at the hearings of the Interstate Commerce Commission as above recited, and by its membership in and through said National Council appeared, was present, and represented at all said committee meetings and hearings as above set forth. That the members of your petitioner, Garment Salesmen's Association, Inc., are commercial travelers whose interests are the same with those of the commercial travelers heretofore mentioned herein, of whom they form a part.

107 7. Your said petitioner, National Council of Traveling Salesmen's Associations, and your other said petitioners as officers thereof, and your said petitioner, Garment Salesmen's Association (Inc.), thus are and were interested in the controversy and question before the Interstate Commerce Commission to which this suit refers, and are interested in the above-entitled cause.

8. Your petitioners herein deny that the order of the Interstate Commerce Commission is not supported by its findings of fact, and that the statement of the findings of the commission as set forth in the said petition of the carriers herein represents a complete, fair, and correct statement of said findings; they deny that the said order prescribes a different charge for the same service under substantially similar circumstances and conditions, that there are not circumstances and conditions justifying the said order, that an undue preference would be established by compliance with said order, and that there can not be a just and reasonable rate for holders of the scrip coupon ticket prescribed less than the rate for other passengers; they deny that travel will not be sufficiently stimulated to overcome or at least equal any decrease there might otherwise be in the revenue of the carriers, and that the carriers will suffer such losses as estimated by them in their petition or any losses whatever, that the said order of the commission is based on a mistaken view of the said amendment to section 22 of the interstate commerce act, that the said order tends to speculate with the carriers' property, that arbitrary exemptions have been made, and that the said order is not restricted to and concerned wholly with interstate commerce; or that in any manner the said order or the said amendment to section 22 of the interstate commerce act establishes a rate which is not just and reasonable, which is noncompensatory, or which is less than required by the interstate commerce act, deprives the carriers of their property without due process of law, or unduly limits their liberty of contract; they deny, further, that the said legislation or the said order of the Interstate Commerce Commission in pursuance thereof in any manner whatsoever violate the interstate commerce act or the Constitution of the United States, or are in any way void or unlawful, as well as each and all the facts and conclusions set forth in said petition of the carriers herein upon which could be predicated the alleged assertions, or any of them, contained in said petition of said violation of the interstate commerce act and of the Constitution of the United States and of the unlawfulness of the said legislation and order.

108 8. There was sufficient evidence to justify the commission in finding that the rate prescribed by its said order is just and reasonable, and the said rate under the conditions provided is entirely warranted by the facts and by the findings of the commission. The ordering of the said scrip coupon ticket at the said rate is not based upon an improper classification of traffic. The public interest renders the said order a proper and reasonable regulation of interstate commerce and

of public utilities, such as are the carriers petitioning here. Compliance with the said order will result in a great stimulation of traffic, both passenger and freight, which will not only equal any direct loss to the carriers through the reduction of fare, but will bring increased revenues to the said carriers above those they are now earning and will generally benefit all producers and consumers of the country.

Wherefore your petitioners pray that they may be allowed to intervene and become parties defendant to this suit and that they be given leave as such to interpose an answer herein within the time prescribed by law and take any and all other proceedings herein in the same manner and to the same extent as if originally defendants herein, to oppose the making of an interlocutory or a permanent injunction, or both, as sought in the petition of the carriers herein, and for such other and further relief in the premises as the nature and circumstances of the case may require and as to your honors may seem equitable and just.

109 NATIONAL COUNCIL OF TRAVELING SALESMEN'S ASSOCIATIONS, an unincorporated association, and Aaron M. Loeb, as president; Samuel H. Liberman, as first vice president; Leon S. Fox, as second vice president; Selden A. McOmber, as third vice president; George W. Allen, as fourth vice president; Sol Wolerstein, as secretary; and Archie E. Foise, as treasurer thereof; and

GARMENT SALESMEN'S ASSOCIATION, INC., *Intervenors*,
By POWERS & HALL,
JAMES N. CLARK,
SAMUEL BLUMBERG,
HOKE SMITH,
Solicitors for Petitioners.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

Sol Wolerstein, being duly sworn, deposes and says that he is one of the petitioners and intervenors herein, is the secretary of the National Council of Traveling Salesmen's Associations, and is the president of the Garment Salesmen's Association, Inc., others of the petitioners and intervenors herein; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

SOL WOLERSTEIN.

Sworn to, before me this 9th day of April, 1923.

[SEAL.]

ARTHUR M. LOEB,
Notary Public.

New York County clerk's No. 192; New York County register's No. 4031. Commission expires March 30, 1923.

In United States District Court.

Also on the same day the following order granting leave to intervene to National Council of Traveling Salesmen's Associations et al is entered:

Order granting leave to intervene.

April 10, 1923.

MORRIS, J.: On presentation of the motion of the National Council of Traveling Salesmen's Associations, an unincorporated association, and Aaron M. Loeb, as president; Samuel H. Liberman, as first vice president; Leon S. Fox, as second vice president; Selden A. McOmber, as third vice president; George W. Allen, as fourth vice president; Sol Wolerstein, as secretary; and Archie E. Foise, as treasurer thereof; and Garment Salesmen's Association, Inc., for leave to file a petition to intervene and for the relief therein sought, it appearing to the court that said petitioners were and are interested in the controversy and question before the Interstate Commerce Commission, to which this suit refers, and in the subject matter of this suit, sufficiently to entitle them to become parties to this suit; it is hereby

Ordered, adjudged, and decreed that the National Council of Traveling Salesmen's Associations, an unincorporated association, and Aaron M. Loeb, as president; Samuel H. Liberman, as first vice president; Leon S. Fox, as second vice president; Selden A. McOmber, as third vice president; George W. Allen, as fourth vice president; Sol Wolerstein, as secretary; and Archie E. Foise, as treasurer thereof; and Garment Salesmen's Association, Inc., have leave to file their said petition to intervene and to intervene and become parties defendant to this suit, and as such to interpose an answer herein within the time prescribed by law, and take any and all other proceedings in the same manner and to the same extent as if originally defendants herein, to oppose the making of an inerlocutory or a permanent injunction or both, as sought in the petition of the carriers herein, and it is further

111 Ordered that this order, together with the motion for leave to file petition to intervene and the said petition to intervene, be served upon Charles F. Choate, jr., the solicitor for the petitioners in said suit, and upon the Attorney General of the United States, by mailing a copy of said papers to each of said persons forthwith.

By the Court:

ARTHUR M. BROWN, *Deputy Clerk.*

In United States District Court.

On the twelfth day of said April, A. D. 1923, the following motion of the United States to dismiss the petition is filed:

Motion of the United States to dismiss the petition.

Filed April 12, 1923.

United States of America, respondent, by its counsel, now comes and moves the court to dismiss the petition in the above-entitled cause at the cost of the petitioners.

As grounds for this motion it is shown:

1. The petition, with the exhibits attached thereto and made a part thereof, is without equity on its face and does not state any cause of action against the respondent, and the court may not grant the relief prayed or any part of the same.

2. It appears from the petition and the exhibits attached thereto and made a part thereof that the order of the Interstate Commerce Commission sought to be enjoined, set aside, annulled, or suspended was authorized by the act to regulate commerce as amended and the transportation act, 1920, and that it was regularly made and entered by the commission after a full hearing.

Wherefore, and for divers other good causes appearing on the face of the petition, more fully to be pointed out on the hearing hereof, respondent prays that its motion be sustained, and for such other and further order or action as may be appropriate.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

ROBERT O. HARRIS,

United States Attorney, District of Massachusetts.

On the twelfth day of April, A. D. 1923, the following affidavits of Julius H. Parmelee are filed:

In United States District Court.

Affidavit of Julius H. Parmelee.

Filed April 12, 1923.

UNITED STATES OF AMERICA,

District of Columbia, City of Washington, ss:

Before me, the undersigned authority, on this date personally appeared Julius H. Parmelee, who, being first duly sworn, deposes and says upon his oath as follows:

I am at present the director of the Bureau of Railway Economics, an organization supported by many of the principal railway com-

panies of the United States, for the purpose of compiling and studying railroad statistics. I have been connected with this bureau for about twelve years, and was for about two years prior to my association with the Bureau of Railway Economics a special examiner for the Interstate Commerce Commission, and in that connection my duties led me to deal exclusively with railway accounts and railway statistics.

In *Increased Rates*, 1920 (58 I. C. C. 229), the Interstate Commerce Commission found that "the value of steam-railway property of the carriers subject to the act, held for and used in the service of transportation" in the Eastern group, as defined in the commission's report in that proceeding, was \$8,800,000,000. This finding of value by the Interstate Commerce Commission included the carrier property of all of the railroads in the Eastern group reporting to the commission, including not only what is known as Class I railways, being those carriers with annual operating revenues in excess of \$1,000,000, but also other railways in that group.

Neither the Interstate Commerce Commission nor the Bureau of Railway Economics normally compile summaries, except for railways of Class I, as defined above, because in a study of the statistics of all carriers for the years 1915 and 1916 it was found that the net railway operating income of Class I roads in the Eastern group represented 98.39 per cent of the total for all carriers in that group, and the number of carriers other than Class I roads reporting to the commission is so great that neither the commission nor the Bureau of Railway Economics has deemed it profitable to compile complete statistics concerning these secondary roads. The consequence is that the net railway operating income of all of the carriers in the Eastern group for recent years has not been made available by compilation of the reports made by all of these individual carriers, but the Interstate Commerce Commission's monthly summary of "Operating revenues and operating expenses of Class I steam roads in the United States" as published for December, 1922, shows the earnings and expenses of Class I railways in the Eastern group for the calendar year 1922 as follows:

12 months—Jan. 1 to Dec. 31, 1922.

Account.	Total Eastern district.	Pocahontas region.	Total Eastern group (Eastern district plus Pocahontas).
1. Railway operating revenues.....	\$2,556,098,153	\$203,811,561	\$2,759,909,714
2. Railway operating expenses.....	2,088,204,462	153,769,529	2,241,973,991
3. Net rev. from ry. operations.....	467,893,691	50,042,032	517,935,722
4. Ry. tax accruals.....	117,423,203	11,462,607	128,885,810
5. Uncollectible ry. rev.....	545,692	21,139	566,831
6. Ry. operating income.....	349,924,796	38,558,285	388,483,082
115 7. Equip. rents—Net balance.... Dr..	39,073,135 Cr.	3,339,836 Dr.	35,733,299
8. Jt. fac. rents—Net balance.... Dr..	9,054,410 Dr.	946,132 Dr.	10,000,542
9. Net ry. operating income.....	301,797,251	40,951,900	342,749,241

The Eastern district and the Pocahontas region constitute the Eastern group as defined by the commission in Increased Rates, 1920, above referred to.

Item 9 above is the net railway operating income as defined in paragraph 1 of section 15a of the transportation act.

In addition to the finding by the Interstate Commerce Commission of the valuation of carrier property in the Eastern group its memorandum of October 23, 1922, pages 3 and 4, states that the net additions to Class I carrier property in the Eastern group made during 1920 amounted to \$243,341,161 and during 1921 amounted to \$175,576,789, thus giving an estimated value of all steam roads in the Eastern group on January 1, 1922, as not less than \$9,218,917,950.

Equating the net earnings of Class I roads by the formula previously described, using 98.39 per cent of the total as representing the earnings of Class I roads, we find that the total net railway operating income for all roads in the Eastern group for the calendar year 1922 was \$348,357,802. This gives a rate of return of 3.78 per cent upon a property valuation, as above set forth, of \$9,218,917,950.

The statistics set out above, including the valuation found by the commission, the net railway operating income, and the rate of return for the calendar year 1922 may be summarized as follows:

12 months—Jan. 1 to Dec. 31, 1922.

Tentative valuation.....	\$9, 218, 917, 950
Net railway operating income.....	348, 357, 802
Rate earned on tentative valuation—annual basis.....	3. 78%

116 While the railroads of the United States do not concur except perhaps in a few instances in the valuation of carrier property stated by the Interstate Commerce Commission in the report which it made in the proceeding above referred to (58 I. C. C. 229), and while the principal railways of the United States contend that the valuation of their property is substantially larger than that stated by the commission in this report, nevertheless, for purposes of conservative statement, I have regarded it as proper in this connection to use the figures arrived at and found by the Interstate Commerce Commission, because the book value of the railroads of the United States and the book value of the roads in the eastern group is considerably in excess of the findings so made by the commission, and would, therefore, indicate, if used, a smaller rate of return than that which is arrived at by using the figures of the commission.

So far as the revenue and expense account of the carriers are concerned for the twelve months above referred to, they are not only compiled by the Interstate Commerce Commission but are also compiled by the Bureau of Railway Economics from duplicate reports sent to it, and therefore scrutinized under my supervision by the Bureau of Railway Economics, and it is therefore my opinion that the revenue, expense, and income account of the Class I roads in the eastern group, given above, is correct.

It is obvious that the results stated above of the study of the net income of Class I roads, as compared with the net income of all roads for the years 1915 and 1916, would probably not be precisely accurate in any other year or years, but it is my opinion, and I assume from the fact that the Interstate Commerce Commission does not compile complete statistics for all roads, that it must also be of the opinion that the result arrived at by using this equation figure of 98.39 per cent is substantially correct, and that in figuring the net rate of return, as I have given it above, any error which might exist would be so small as to be entirely negligible for practical purposes.

Based upon the studies which I have made of railway earnings in the eastern group for the calendar year 1922, it is my opinion that the net railway operating income of all steam railroads
117 in the eastern group, as defined by the Interstate Commerce Commission in its aforesaid report, was not in excess of 3.78 per cent upon the valuation of their property held for and used in the service of transportation during the calendar year 1922.

And further deponent saith not.

JULIUS H. PARMELEE.

Sworn to before me and subscribed in my presence this thirtieth day of March, 1923.

MARY A. SHILTON,

Notary Public in and for District of Columbia.

My commission expires May 9, 1924.

In United States District Court.

Second affidavit of Julius H. Parmelee.

Filed April 12, 1923.

UNITED STATES OF AMERICA,

District of Columbia, City of Washington, ss:

Before me, the undersigned authority, on this date personally appeared Julius H. Parmelee, who, being first duly sworn, deposes and says upon his oath as follows:

I am at present the director of the Bureau of Railway Economics, an organization supported by many of the principal railway companies of the United States for the purpose of compiling and studying railroad statistics. I have been connected with this bureau for about twelve years, and was for about two years *and was for about two years* prior to my association with the Bureau of Railway Economics a special examiner for the Interstate Commerce Commission, and in that connection my duties led me to deal exclusively with railway accounts and railway statistics.

Number of reporting carriers.

The Interstate Commerce Commission in its "Thirty-fourth Annual Report on the Statistics of Railways in the United States for the year ended December 31, 1920," page IX and X, show the number of common carriers engaged in interstate commerce which regularly file operating reports with that commission as follows: Number Dec. 31, 1920:

118 Class of carrier:

Operating companies that file reports—

Class I.....	186
Class II.....	303
Class III.....	383
Switching and terminal companies.....	301

Total 1,173

Class I railways are carriers with annual operating revenues in excess of \$1,000,000.

Class II railways are carriers with annual operating revenues from \$100,000 to \$1,000,000.

Class III railways are carriers with annual operating revenues below \$100,000.

Switching and terminal companies are operating corporations engaged in switching or terminal service.

Passenger revenues in 1922.

According to a compilation prepared and checked under my direction, based upon the sworn reports of the railways to the Interstate Commerce Commission, the Class I railways in the Eastern group, during the calendar year ended December 31, 1922, earned an aggregate passenger revenue amounting to \$539,493,816.

According to a similar compilation, based upon the sworn reports to the Interstate Commerce Commission of the petitioning carriers set out on page 3 of petition filed in equity, District Court of the United States for the District of Massachusetts, entitled "The New York Central Railroad Company et al., petitioners, against The United States of America, respondents," filed March 30, 1923, those petitioning carriers, during the calendar year ended December 31, 1922, earned an aggregate passenger revenue of \$476,039,465. This amount of \$476,039,465 is 88.24 per cent of the total passenger revenue of all Class I railways in the Eastern group, as set forth above.

The Eastern group comprises the Eastern district and the Pochontas region as designated by the Interstate Commerce Commission in Reduced Rates, 1922 (68 I. C. C.).

119 And further deponent saith not. JULIUS H. PARMELEE.
Sworn to and subscribed before me, this 7th day of April, 1923.

SAMUEL FILAND,
Notary Public in and for the District of Columbia.

Also on the same day the following answers are filed :

Answer of Interstate Commerce Commission.

Filed April 12, 1923.

The Interstate Commerce Commission, intervening respondent in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioners' petition contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

Answering Paragraphs I to VII, inclusive, of the petition, said intervening respondent, Interstate Commerce Commission,
121 hereinafter called the commission, admits, for the purposes of this suit, that the allegations contained in said paragraphs are true.

Answering Paragraph VIII of the petition, the commission admits that the allegations contained therein are substantially correct. In this connection, however, the commission alleges that the carriers who are required by its order of March 6, 1923, to issue and sell the ticket mentioned are shown in and by said order, to which the court is referred for more full and complete information in the premises.

Answering Paragraphs IX to XXIII, inclusive, of the petition, the commission admits and alleges that it made and entered the supplemental report and the order, dated March 6, 1923, referred to in said paragraphs, copies of which are included in Exhibit D to the petition, and the report of January 26, 1923, referred to in Paragraph VI of the petition, a copy of which is Exhibit C to the petition, in a proceeding then pending before it, for the purpose of complying with the requirements of section 22 of the interstate commerce act, paragraph (2) of which reads as follows:

"The commission is directed to require, after notice and hearing, each carrier by rail, subject to this act, to issue at such offices as may be prescribed by the commission interchangeable mileage or
122 scrip coupon tickets at just and reasonable rates, good for passenger carriage upon the passenger trains of all carriers by rail subject to this act. The commission may in its discretion exempt from the provisions of this amendatory act either in whole or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made. Such tickets may be required to be issued in such denominations as the commission may prescribe. Before making any order requiring the issuance of any such tickets the commission shall make and publish such reasonable rules and regulations for their issuance and use as

in its judgment the public interest demands; and especially it shall prescribe whether such tickets are transferable or nontransferable, and if the latter, what identification may be required; and especially also to what baggage privileges the lawful holders of such tickets are entitled."

The commission further alleges that said proceeding was instituted by it upon its own motion, under the authority conferred upon it by paragraph (2) of section 13 of said act, by its order dated August 23, 1922, a copy of which is Exhibit B to the petition.

The commission further alleges that said order of August 23 was duly served upon the respondents herein; that subsequent to
 123 such service the commission accorded to the parties to said proceeding the full hearings provided for in section 15 of said act; that at said hearings a large volume of testimony and other evidence bearing upon the matters covered by said order of August 23 was submitted to the commission for consideration, on behalf of said parties, by their respective counsel; that at said hearings and subsequently, both orally and in briefs filed in said proceeding, questions relating to said matters were fully argued and submitted to the commission for determination, on behalf of said parties by their counsel, whereupon the commission determined said matters and made and entered and served upon respondents herein said report of January 26 and said supplemental report and order of March 6, which included the commission's decision, conclusions, order, and requirements in the premises; that upon the evidence aforesaid, and as shown in and by said report of January 26 and said supplemental report and order of March 6, the commission made the findings, stated the conclusions, and prescribed the rules and regulations upon which said order of March 6 is based. In this connection, among other things, the commission said:

"We find and conclude that on and after March 15, 1923, carriers by rail, respondents herein, enumerated in Appendix C, shall establish, issue, and maintain, at such offices as we may hereafter
 124 designate, a nontransferable interchangeable scrip coupon ticket in the denomination of \$90, which shall be sold at a reduction of 20 per cent from the face value of the ticket. We further find that the rates resulting from that reduction will be just and reasonable for this class of travel. This scrip coupon ticket shall be good, within one year from the date of its sale, for carriage of passengers on all passenger trains operated by said respondents, except that in the case of special or extra-fare trains its use will be subject to the payment by the passenger of the special or extra fare. Respondents shall keep a record of the use of the tickets during the first 12-month period, which should reflect its effect on passenger revenues, the number of scrip tickets sold, and the gross revenue derived from their sale. Parties other than carriers primarily interested in this experiment should likewise record their experience with this ticket in order that the actual results of the experiment may

be ascertained to the fullest extent possible. Any party to this proceeding may bring the matter to our attention for further consideration on or about January 1, 1924, with such statements as they choose to make concerning the operation and effect of the scrip tickets."

The commission further alleges that said findings, conclusions, and rules and regulations were and are, and that each of them was
125 and is, fully supported and justified by the evidence submitted to the commission in said proceeding as aforesaid.

The commission further alleges that, in making said report of January 26 and said supplemental report and order of March 6, it considered and weighed carefully, in the light of its own knowledge and experience, every fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding by their respective counsel, including all matters covered by the allegations of the petition herein, particularly the allegations contained in Paragraphs IX to XXIII, inclusive, of said petition.

The commission further alleges that the rate at which the carriers named in said order of March 6 are required to establish, issue, maintain, and keep in force, the nontransferable interchangeable scrip coupon ticket referred to in said order, will furnish to the carriers covered by the order, including the petitioner herein, full, reasonable, fair, and just compensation for services to be performed by them and included in said rate, and denies each of and all the allegations to the contrary contained in said petition.

The commission further alleges that said order of March 6 was not made or entered either arbitrarily, or unjustly, or contrary to
126 the relevant evidence, or without evidence to support it; that in making said order it did not exceed the authority which had been duly conferred upon it, or exercise that authority in an unreasonable manner; and the commission denies each of and all the allegations to the contrary contained in said petition.

Except as herein expressly admitted, the commission denies the truth of each of and all the allegations contained in said petition, in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said report of January 26, or supplemental report and order of March 6, which are hereby referred to and made a part hereof.

All of which matters and things this respondent is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
By P. J. FARRELL, *Chief Counsel*.

127 CITY OF WASHINGTON,
District of Columbia, ss:

Balthasar H. Meyer, being duly sworn, deposes and says that he is a member and chairman of the Interstate Commerce Commission, the above-named intervening respondent, and makes this affi-

davit on behalf of said commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true.

BALTHASAR H. MEYER,

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia, this —— day of April, 1923.

[SEAL.]

ALFRED HOLMEAD, *Notary Public.*

128

In United States District Court.

Answer of National Council of Traveling Salesmen's Associations et al.

Filed April 12, 1923.

And now come the National Council of Traveling Salesmen's Associations et al., and the Garment Salesmen's Association (Inc.), intervening respondents in the above-entitled cause, and move
129 to dismiss the bill filed in this action because said bill does not state any matter of equity entitling the petitioners to the relief prayed for nor are the facts as stated sufficient to entitle petitioners to any relief against the respondent, the United States of America.

Intervening respondents, further answering the petition and particularly Paragraphs I to VII, inclusive, of said petition, admit for the purposes of this suit that the allegations therein contained are true.

Answering Paragraph VIII of the petition, intervening respondents admit that the allegations contained therein are substantially correct, but allege that the carriers who are required by said order of March 6th, 1923, to issue and sell the scrip coupon tickets mentioned are designated in and by said order, to which this court is referred for more complete information in the premises.

Answering Paragraphs IX to XXIII, inclusive, of the petition, intervening respondents admit and allege that the Interstate Commerce Commission made and entered a supplemental report and order dated March 6th, 1923, referred to in said paragraphs, copies whereof are included in Exhibit "D" annexed to the petition herein, and the report of January 26th, 1923, referred to in Paragraph VI of the petition herein, a copy whereof is Exhibit "C" annexed to the said petition, in a proceeding then before the Interstate Commerce Commission for the purpose of complying with the requirements of section 22 of the interstate commerce act, and in this connection, intervening respondents allege that the said proceeding
130 was instituted by the Interstate Commerce Commission upon its own motion pursuant to authority conferred upon it by paragraph 2 of section 13 of said act, by the order of the Interstate Commerce Commission, dated August 23rd, 1922, a copy whereof is Exhibit "B" annexed to the said petition.

Intervening respondents allege that the said order of August 23rd, 1922, was duly served upon the petitioners here; that subsequently thereto the commission accorded to the parties to said proceeding full hearings provided for in section 15 of said act; that at said hearings a large volume of testimony and other evidence bearing upon matters covered by said order of August 23rd, 1922, was submitted to the commission for its consideration on behalf of said parties and by their respective counsel; that at said hearings petitioners and intervening respondents herein submitted to the Interstate Commerce Commission for consideration, evidence bearing upon the matters covered by the order of August 23rd, 1922; that at said hearing and subsequently both orally, and in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Interstate Commerce Commission for its determination not only by the petitioners herein and their counsel but by the intervening respondents herein and others; that the Interstate Commerce Commission determined said matters and made, entered, and served upon the petitioners herein its report of January 26th, 1923, and its supplemental report and order of March 6th, 1923, which included the decisions of the Interstate Commerce Commission, its conclusions, its order, and its requirements in the premises; that upon the evidence aforesaid
 131 and as shown in and by its report of January 26th, 1923, and its supplemental report and order of March 6th, 1923, the Interstate Commerce Commission made its findings, stated its conclusions and made its rules and regulations upon which the order of March 6th, 1923, is based, all of which appears in the order of the Interstate Commerce Commission, referred to as Exhibits "C" and "D" in the petition of the petitioners herein.

The intervening respondents herein further allege that said findings, conclusions, rules, and regulations were and are, and each of them was and is fully supported and justified by the evidence submitted to the commission in its said proceeding as aforesaid, and in this connection further allege that in making its said report of January 26th, 1923, and its supplemental report and order of March 6th, 1923, the Interstate Commerce Commission considered and weighed carefully in the light of its own knowledge and experience every fact and circumstance necessary for a proper determination of the proceeding.

The intervening respondents deny that the decision of the Interstate Commerce Commission is not supported by its findings of fact, and that the findings of fact of the Interstate Commerce Commission, as set forth in the petition of the petitioners herein, represents a complete, fair, or correct statement of its findings.

The intervening respondents deny that the said decision prescribed a different charge for the same service under substantially similar circumstances and conditions, and deny that there are not circumstances and conditions justifying the said decision of the Interstate Com-

merce Commission, that an undue preference would be established by compliance therewith, and that there cannot be a just and reasonable rate for holders of the scrip coupon ticket prescribed, less than the rate for other passengers.

Intervening respondents further deny that travel will not be sufficiently stimulated to overcome or at least equal any decrease there might otherwise be in the revenue of the petitioners herein, and that the petitioners herein will suffer such losses as are estimated by them in their petition or any loss whatever.

Intervening respondents further deny that the said order of the Interstate Commerce Commission is based upon a mistaken view of the said amendment to section 22 of the interstate commerce act; that the order tends to speculate with the carrier's property, that arbitrary exemptions have been made and that the said order is not restricted to and concerned wholly with interstate commerce.

Intervening respondents further deny that the said order or the said amendment to section 22 of the interstate commerce act establishes a rate which is not just and reasonable, which is noncompensatory or which is less than required by the interstate commerce act, and deprives the petitioners herein of their property without due process of law, or unduly limits their liberty of contract.

Intervening respondents further deny that the legislation or the said order of the Interstate Commerce Commission in pursuance thereof, in any manner whatsoever violates the interstate commerce act or the Constitution of the United States, or is in any way void or unlawful as well as each and all the facts and conclusions set forth in the petition of the petitioners herein upon which could be predicated the alleged claims and assertions or any of them contained in said petition of said violation of the interstate commerce act and of the Constitution of the United States, and of the unlawfulness of said legislation or order.

Intervening respondents further deny that the petitioners herein have no adequate remedy at law.

Intervening respondents allege that the rate at which the petitioners named in said order of March 6th, 1923, are required to establish, issue, maintain, and operate the nontransferable interchangeable scrip coupon ticket referred to in said order, will furnish to the petitioners covered by said order, full, reasonable, fair and just compensation for services to be performed by said petitioners and included in said rate, and deny each and every allegation to the contrary contained in said petition.

Intervening respondents further allege that the said order of March 6th, 1923, was not made or entered either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support it and that in making its said order the Interstate Commerce Commission did not exceed the authority which had been conferred upon it or exercise its authority in an unlawful or unreasonable manner, and deny each and every allegation to the contrary contained in the petition of the petitioners herein.

Except as herein expressly admitted, the intervening respondents herein deny the truth of each and every allegation contained in
 134 said petition, in so far as it conflicts either with the allegations or statements set forth herein or with the statements or conclusions in the report of the Interstate Commerce Commission of January 26th, 1923, or the supplemental report and order of the Interstate Commerce Commission of March 6th, 1923, which are herein referred to and made a part hereof, as though set forth herein at length.

Wherefore your intervening respondents pray that the said petition be dismissed.

NATIONAL COUNCIL OF TRAVELING
 SALESMEN'S ASSOCIATIONS ET AL.,
 By SAMUEL BLUMBERG, Esq.,
 200 Fifth Avenue, New York City.
 HOKE SMITH, Esq.,
 Southern Building, Washington, D. C.,
General Counsel.
 POWERS & HALL, Esqs.,
 101 Milk Street, Boston, Mass.,
Of Counsel.

135 STATE OF NEW YORK,
City of New York, County of New York, ss:

Sol Wolerstein, being duly sworn, deposes and says that he is one of the intervening respondents herein; is the secretary of the National Council of Traveling Salesmen's Associations, and is the president of the Garment Salesmen's Association, Inc., others of the intervening respondents herein; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief; and that as to those matters he believes it to be true.

SOL WOLERSTEIN.

Sworn to before me this 10th day of April, 1923.

[SEAL]

ARTHUR M. LOEB, *Notary Public.*

New York County clerk's No. 192; New York County register's No. 4031. Commission expires March 30, 1924.

136 Also on the said twelfth day of April the order of April 10, entered by the Honorable George F. Morris, granting leave to the National Council of Traveling Salesmen's Association and others to intervene is confirmed by the court, Honorable Julian W. Mack, circuit judge, and Honorable George F. Morris and Honorable Elisha H. Brewster, district judges, sitting.

Also on the same day this cause is set down for hearing and is fully heard by the court, Honorable Julian W. Mack, circuit judge, and Honorable George F. Morris and Honorable Elisha H. Brewster, district judges, sitting.

On the thirteenth day of said April the following intervening petition is filed:

In United States District Court.

Petition of Baltimore & Ohio Railroad Company to intervene as Petitioner.

Filed April 13, 1923.

To the Honorable the Judges for the District Court of the United States for the District of Massachusetts:

The Baltimore & Ohio Railroad Company respectfully represents that it is a corporation organized and existing under the laws of the States of Maryland, Virginia, and Pennsylvania and a common carrier engaged in the business of operating railroads in interstate commerce; that it was a respondent and a party in interest before the Interstate Commerce Commission in the proceeding in which were made the orders dated January 26, 1923, and March 6, 1923, which the petitioners in the above entitled cause seek to have enjoined, set aside, annulled, and suspended.

Wherefore the said corporation now prays for leave to intervene as party petitioner in the above entitled cause.

BALTIMORE & OHIO RAILROAD COMPANY,

By its Attorney, CHAS. F. CHOATE, JR.

On the said thirteenth day of April the foregoing petition to intervene is allowed by the court, the Honorable George F. Morris, district judge for the District of New Hampshire, duly assigned to hold said District Court, sitting.

137 On the twenty-third day of April, A. D. 1923, an opinion was announced, granting a permanent injunction against the enforcement of the order of the commission, the Honorable Julian W. Mack, circuit judge, and Honorable George F. Morris and Honorable Elisha H. Brewster, district judges, sitting.

138 On the fifteenth day of May, A. D. 1923, the following affidavit of Samuel Blumberg on behalf of the National Council of Traveling Salesmen's Association et al., intervening respondents, is filed as of April 12, 1923:

In United States District Court.

Affidavit of Samuel Blumberg on behalf of the National Council of Traveling Salesmen's Association et al., intervening respondents, filed May 15, 1923, as of April 12, 1923.

STATE OF NEW YORK,

County of New York, ss:

Samuel Blumberg, being duly sworn, deposes and says: That he is an attorney and counsellor at law, duly admitted to practice in the

State of New York. He is one of the general counsel for the
 139 National Council of Traveling Salesmen's Associations, one of
 the intervening respondents herein, and as general counsel
 has for a number of years been in charge of the activities of said
 respondent as a proponent of the legislation enacted by the amend-
 ment of August 18th, 1922, to section 22 of the interstate commerce
 act, and in charge of the hearings before the Interstate Commerce
 Commission, and that he is one of the general counsel for said re-
 spondent in this suit and thoroughly familiar with the questions and
 facts herein involved.

1. Prior to August 18th, 1922, respondent, National Council of
 Traveling Salesmen's Associations, with others, endeavored to con-
 summate arrangements with the carriers by which an interchange-
 able scrip coupon ticket of the nature prescribed by the order of the
 Interstate Commerce Commission which is the subject of this suit,
 should be issued, but these efforts were unsuccessful. Thereafter
 respondent conferred with the Interstate Commerce Commission to
 the same purpose; but the commission indicated that it was without
 authority to order the issuance of such a ticket. Subsequently bills
 were introduced in both Houses of Congress, seeking to bring about
 such legislation as would make it mandatory upon the commission
 to order the carriers to issue mileage books, and after careful con-
 sideration and deliberation, and after the introduction of evidence
 and the taking of testimony, including that of a representative of
 the said Interstate Commerce Commission, before various committees
 of Congress, and after thorough investigation of the facts and
 140 policy involved as well as the constitutionality of the legisla-
 tion proposed and with various amendments made to the
 original bills, introduced, an act amending section 22 of the interstate
 commerce act was unanimously adopted by both Houses of Congress
 requiring the Interstate Commerce Commission to make an order in
 the premises, and became a law.

2. Thereafter and pursuant to the provisions of section 22 of the
 interstate commerce act, the commission instituted an original pro-
 ceeding on its own motion and issued its orders providing for in-
 vestigation so that it might obtain data and hear argument bearing
 upon the action it was required to take by the said act of Congress
 from any parties interested, and in pursuance of said order of in-
 vestigation hearings were held before the said commission at which
 testimony was introduced at great length and at which full oppor-
 tunity was given to all parties interested to present any facts
 and data that might be appropriate, and the various parties and all
 of them were given opportunity to make oral argument and to
 file briefs with the said commission. At all said hearings interven-
 ing respondents and the carriers, petitioners herein, adduced evi-
 dence and oral argument, and subsequently thereto filed
 briefs and memoranda. Thereafter the said commission made its re-
 ports and order of January 26th, 1923, and March 6th, 1923, after
 weighing carefully in the light of its own knowledge and experience

the facts and circumstances necessary for a proper determination of the proceeding.

141 3. At said hearings before the Interstate Commerce Commission, the records disclose that the following persons testified on behalf of your intervening respondents: David K. Klink, representing the International Federation of Commercial Travelers; John F. Shea, representing the American Hotel Association; Aaron M. Loeb, representing the National Council of Traveling Salesmen's Associations; James C. Lincoln, representing the Merchants' Association of New York, all of them men for many years interested in passenger and freight traffic over the railroads of this country, and all long experienced with problems of transportation. These men testified that the rates now enforced were so high that they did discourage and seriously curtail travel by the very persons who, if a proper reduction were fixed, would not only themselves do such an additional amount of traveling as would more than recoup the carriers for the direct loss from such a reduction, but who would also, by the additional amount of effort they would be enabled to put forth as a result of such a reduction, so stimulate the commerce of the country and its business generally that the freight traffic also of the carriers would be increased. In support of these statements the witnesses specified that the reduction would be an inducement to traveling salesmen on commission now reluctant to venture into new territories, and business houses now finding it impracticable because of the expense entailed to open up new territory, to do so, and that in the same manner and for the same reasons many more salesmen would travel, and that all salesmen generally would make longer trips.

142 4. A questionnaire sent to many representative merchants of this country in some fifty-four (54) different lines of industry by the intervening respondents herein, together with the answers received thereto, was introduced in evidence. These answers stated that if the reduction were granted it would greatly stimulate business. They showed the unanimous confidence of merchants that reduced rates would stimulate passenger and freight carriage far beyond any temporary loss in revenue directly entailed by the reduction. They showed, setting forth definite figures, that since rates were increased by approximately the amount of the reduction granted by the present order of the commission, large numbers of men have been taken off the road and in the case of nearly every firm there has been a large decrease in the number of weeks of travel by the salesmen of that firm. They showed a great limitation of travel, a resulting increase of prices and retarding of business, all of which they attributed mainly to the high rates of transportation. They stated definitely that with such a reduction as has now been ordered they themselves and merchants generally would increase the number of men on the road, extending the territory covered as well as the time of trips, and that such reduced rates would enable them to reenter and open to trade country districts and small towns. These answers

also stated that the high cost of transportation has driven merchants to comparatively inefficacious expedients resulting in much loss to the carriers, such as the use of the automobile, mail, photograph, telegraph, and telephone.

143 5. The testimony before the commission further showed that the general public, responding to the reduction which it would obtain by traveling greater distances during the prescribed period, would be enabled to consummate its affairs requiring travel with greater facility and, accordingly, urged by the reduction to be obtained, would so travel over much greater distances; that buyers would go to market oftener; that the producers of the country would be afforded larger and more intensified markets for their products; and that the consumers of the country would be afforded opportunities of choice and purchase of its commodities to an extent which would be proper and which would make for the general prosperity of the country and the advantage of its industries.

6. In addition, there were before the commission statements of men of affairs with wide experience in transportation, from both sides of Congress, which are in part as follows:

Senator CUMMINS. "In so far as the selling of transportation in this way and in so far as all the operations which are connected with that transportation are concerned which tend to reduce the cost of the service, the Interstate Commerce Commission may very well, in my judgment, establish a lower rate per mile than the ordinary rate which is now in force or which may be in force at any given time."

Senator McKELLAR. "Mr. President, the necessity of this legislation, it would seem to me, would be obvious to anyone. * * *

144 We are not seeking, Mr. President, to put any new or untried policy upon the railroads. We are simply readopting that wise policy that the railroads themselves had followed for many years prior to Government control. * * * In the next place, it is in another respect obviously for the best interest of the railroads. The undisputed proof is that business firms have had greatly to decrease their number of commercial travelers because of the excessive rates. Now, when we remember that every commercial traveler in this country is not only a traveler for the particular business which employs him, but is a business getter for the railroads as well, we must see the importance to the railroads themselves of adding to the number of commercial travelers in this country. Every time a drummer sells a bill of goods for his house he also sells transportation to the railroads. Not only his own transportation, but transportation for the goods which he sells. * * * Under these circumstances it seems to me a wholly misguided self-interest on the part of the railroads when they do not welcome the sale of mileage books.

"Mr. President, of course the sale of these tickets will greatly advantage the public. The enormous cost of travel must necessarily keep many from traveling that would travel, and under well-known economic rules we know that railroads depend for their prosperity upon the volume of business done rather than upon the height of the

rate. These books will unquestionably bring about an increase in travel, and for the same overhead greater revenues could be made from a lower passenger rate * * *

145 "Mr. President, the passage of this bill and the sale of these mileage books will greatly benefit the business of the country. The business of the country is at a low ebb. Business men are doubtful of the future. Their taxes are high, their tariff duties are high, all out of proportion to the amount of business they are doing. We should get back on a reasonable basis. We should get back to a condition of affairs that will make them safe in enlarging and extending their business. The more traveling men we can put upon the roads, the more we do for the business of the country and the more we do for the railroads. There is an imperative demand all over the country for this decrease of rates."

Senator ROBINSON. "Let me turn briefly to a consideration of what I believe will be the reasonable effect of this legislation. First, it will tend to stimulate travel. The railroad executives of the country do not seem to realize that by the maintenance of both excessive passenger and freight rates business which ordinarily should be conducted on the railroads is being diverted to other instrumentalities.

"Throughout the United States better roads are being constructed and thousands of commercial travelers and others in the course of their regular business are employing automobiles for traveling, and thousands of persons are receiving deliveries of freight through automobile trucks and similar means. The reason, in part, for it is that both passenger and freight rates are too high on the railroads. If freight rates were reduced to-morrow, judiciously reduced, intelligently reduced, it probably would promote more business and
146 yield more revenue than the railroads are now receiving, and the same is equally true of passenger rates.

"This diversion of traffic from railroads to automobiles and automobile trucks is a policy that is growing, and the railroads can only counteract it by doing something to invite and encourage the public to use their instrumentalities.

* * *
"I do not believe that any Senator will controvert the proposition that there is a point at which an ascending scale of rates will diminish revenue. If passenger fares were 10 cents per mile instead of 3.6 per mile as now, the revenues from passenger fares would probably be much less than the amount which is now received. I have before me a statement of the revenues received from passenger fares on all Class I railroads in the United States during every month, beginning January, 1915, and I am going to put that statement in the record. I take the position that the increases in passenger rates to which I am about to refer have not materially increased revenues but in all probability have diminished them.

* * *
"I wish to make a comparison now between the revenues under the rate when the average was 2.6 per mile and the revenues under

the rate when it became 3.6 per mile. As the Senator from Iowa has suggested, these figures are not conclusive of the point I am seeking to make; a great many circumstances properly enter into the consideration of the question, and I do not think it is possible for anyone to say that the analogy which I am drawing is a conclusive one; but during the first half of 1920 the total revenues from

an average fare of 2.6 per mile were \$564,586,242, while during 147 the first half of the following year, after the order to which

I have referred, granting a 20 per cent increase and providing for a surcharge on the fares of those who ride in Pullman or parlor cars had gone into effect, the revenues were \$573,254,211, or an increase of only a little over \$8,666,000, notwithstanding the rate had been increased on the average from 2.6 per mile to 3.6 per mile.

* * * * *

"That enforces the proposition I am making. Carry this comparison further. I said these rates were now so high that they discourage travel. The comparison I am making proves that. While the revenues for the first half of 1921, under the high rates I have already described, exceeded the revenues for the first half of 1920, by \$8,666,000 plus, the number of fares paid was approximately \$73,000,000 less in the first half of 1921 than in the first half of 1920. The number of fares paid in the first half of 1920 was 595,771,000. The number in the same period of 1921 was only 522,195,000 or more than 73,000,000 less, tending to show that these rates did discourage travel very greatly.

"In addition to that, not only were the number of fares sold under the high rate greatly diminished, as I have just shown, but the average journey traveled under the new and high rates for the first half of 1921 was only 35.4 miles, while the average journey under the lower rate in force in the first half of 1920 was 36.41 miles."

In a dissenting opinion in *Reduced Rates, 1922*, Commissioner Cox, of the Interstate Commerce Commission, said:

148 "Passenger fares at present rate levels have been reflected in a marked falling off in traffic. No further argument should be necessary than the fact that passenger travel is over seven billions of revenue passenger miles below normal. Representatives of industrial and commercial interests have made requests for a reduction in rates repeatedly, and they are unanimous in their opinion, in which I fully concur, that the issuance of a mileage book at a reduced rate of fare would not only stimulate travel but would also increase the present revenue of the carriers."

7. The evidence adduced further showed that because of the facts and circumstances testified to as above, namely, because of the large stimulation of freight and passenger travel to be expected, the difference in rate granted to persons coming within this class of travel would not be discriminatory. It was shown that the carriers had themselves for many years granted reduced mileage rates analogous to the present rate, and this after the development of the law against just such unreasonable discrimination as they claim the present order

creates, and that also there are at the present time and had been in the past analogous cases, such as those of commutation, convention, excursion, and tourists' tickets, granting reduced rates, which petitioners present claim of discrimination, if valid, would likewise prohibit.

8. The evidence was further to the effect that one of the bases for the present reduced rate is the wholesale principle, just as it is in the establishment of lower fares for commuters, excursionists, and tourists, and as recognized by public utility corporations and public utility commissions in regard to the sale of gas, electricity, and telephone service. It is interesting to note that the commission referred in its report to this wholesale principle as applying to the present reduced rate, and while distinguishing it from the wholesale principle as far as the element of resale is concerned and from that appertaining to carload rates, did not distinguish it from the principle applying to the rates just mentioned.

9. It was shown by the witnesses called on behalf of the intervening respondents herein, as well as by the admissions of the witnesses of the carriers, that until reduced mileage rates were abolished by the Federal Railroad Administrator the carriers had in previous years issued mileage at rates varying from ten (10%) to thirty-three and $\frac{1}{3}$ (33 $\frac{1}{3}$ %) per cent, as well as that the reduced rates granted on other kinds of tickets, such as commutation, excursion, convention, and tourists' often equalled and exceeded the present reduction, and in this connection the commission said in the conclusion of its report of January 26th, 1923:

"And the fact that for many years prior to Federal control, the carriers voluntarily sold mileage books at discounts ranging from ten (10%) to thirty-three and one-third (33 $\frac{1}{3}$ %) per cent is not without significance."

10. Although the carriers attempted to show on the hearing that the expenses of accounting and selling these tickets would be very large, it is urged they did not produce figures based on actual use. The only concrete evidence purporting to indicate such expenses consisted of a statement of pay roll for the passenger accounting department of the Southern Railway Company. But it was pointed out to the commission by deponent that this statement really showed that while in two (2) years, from 1915 to 1917, there had been an increase of twenty-five thousand (\$25,000) dollars for all office expenses, the increase in the expenses for the cost of auditing mileage and scrip tickets amounted to only one hundred (100) dollars thereof, although in that time there must have been a considerable increase in passenger travel and in the number of mileage books used, despite which the percentage of expenses attributable directly to mileage did not perceptibly increase.

11. The evidence further showed that the carriers are carrying, as is necessary, a large, permanent overhead in roadbed and rolling stock, and that by increasing the use thereof by such a reduction as the present one, this property, which is now not used to full ad-

vantage, would be availed of so as to decrease the ratio of this fixed overhead to the receipts of the carriers and thus to decrease passenger and freight operating ratios.

12. In the past, and at present, the carriers have sold long distance through tickets under which the moneys paid for such transportation were received by the original carrier issuing said ticket, even though it might actually undertake only a trifling part of the carriage involved, and yet, all other carriers are forced to honor said ticket despite the fact that such action on their part involves a compulsory giving of credit to the carrier selling the ticket, and there are many other examples where the railroads are compelled in the public interest to give credit and make agreements among themselves.

13. All the evidence before the commission referred to both interstate and intrastate fares, to the latter, however, only as constituting part of the general system of interstate commerce. It appeared therefrom that intrastate fares, in relation to the reduction here concerned, were so bound up with fares for purely interstate travel, and with the obtaining of a fair return, as nearly as might be, on the valuation of interstate carriers, as to make necessary in the proper regulating of interstate commerce and in preventing an undue burdening thereof with high rates, a reduction applying to all fares.

14. The historic case of the struggle against the reduction of postal rates in England, as well as the struggle of certain carriers in this country against commutation rate reductions, both of which in operation proved largely profitable, was shown to the commission.

15. As opposed to the evidence hereinbefore referred to, the carriers produced no evidence whatsoever of probative force or which was relevant to show that the proposed reduction of rate would decrease or would not increase their revenue.

The following colloquy occurred between your deponent and C. A. Fox, the chief witness for the carriers, in regard to the results of using mileage books:

By Mr. BLUMBERG:

"Q. As a matter of fact, do you know whether by the issuance of these books at these reduced rates that traffic was stimulated or whether traffic was curtailed?—A. We believe that it was not stimulated.

"Q. I do not want to know what you believe. Do you happen to know from statistics whether there was more travel as a result of these reduced rates? You don't know, do you?—A. I do not know.

"Q. So that, of course, you would not be prepared to say now whether if there were a reduced rate that traffic might be stimulated?—A. I am not prepared to say (92 S. M.)"

And again—

"Q. Well, that would not answer the question as I tried to put it to you. I wanted to know whether data was not available that

would directly show either an increase or decrease in the passenger revenue created by the use of these mileage books.—A. It is not available (108 S. M.).”

And once more—

“Q. I am asking you whether you have any direct information, concrete figures, for submission to this commission upon which you predicate your conclusion that there were revenue losses by the operation of these mileage books?—A. I have not, sir.

153 “Q. You haven’t tried to get it together or you don’t think it is available?—A. It would be practically an impossibility from the experience of the witness to compile data of that character.

“Q. Have you attempted to do so?—A. I would not know how to go about to do it (118 S. M.).”

16. In all the years commercial travelers have endeavored to secure an interchangeable mileage book at a reduced rate, first by conference with the carriers themselves, then by petition to the Interstate Commerce Commission, later by congressional legislation, and finally by investigation by the commission itself, the carriers, with all the statistical data available, with the millions of dollars spent in their statistical departments, did not at the hearings before the commission offer any appropriate data, and their failure to do so might be considered as tantamount to an admission that if compiled figures would be shown favorable to the making of a reduction. Further, the carriers did not have compiled nor did they produce any testimony whatever as to the effect of mileage rates in Canada, although, as deponent is informed and believes, such reduced rates have been used there for some time.

17. In the hearings before the commission, In re Reduced Rates, 1922, a chart was introduced, as deponent is informed and verily believes, showing the pre-war trend of passenger traffic from 1890 to 1915 and projected through and after the war. That chart showed that the peak of passenger travel was reached in 1920, and
154 that there was a tremendous and precipitous decline in 1921, which as your deponent verily believes was due either to business depression or to the high level of passenger rates. Railroad rates have remained at the same high level. Although business conditions have been gradually returning to a normal basis, there still exists the tremendous deficit in revenue passenger miles below normal, which deponent can only believe is due to such high rates.

18. Your affiant is familiar with the evidence adduced on both sides, and in many cases directly with the original facts involved, and as he verily believes, the evidence adduced upon the part of the intervening respondents herein, as set forth above, is true. As deponent verily believes, travel and freight traffic will be greatly stimulated to such an extent as to equal, or in all probability largely to overcome, any temporary decrease in revenue. The expenses of accounting and selling these tickets under the facilities of the carriers already existing, will be negligible, and especially so in comparison

with the increase of revenues just mentioned, and again, will be largely compensated, if not more than met, by the additional benefit accruing to the carriers because of receiving the money for the ticket ordered in advance.

19. Such scrip coupon ticket as now ordered issued by the Interstate Commerce Commission is justified by the circumstances
155 and conditions shown above. The evidence presented clearly established that fact and furthermore the order for such scrip coupon ticket is fully supported by the findings of the commission, as will appear from a reading thereof.

20. The petitioners herein have not shown any grounds either to the commission or to this court in their petition sufficient to justify this court in going behind the findings of fact and conclusions of the Interstate Commerce Commission, the body authorized by law to administer the interstate commerce act.

21. Deponent further says that the carriers have not shown in their petition that any damage or irreparable injury of any kind would result to them from a compliance with the said order of the Interstate Commerce Commission. For, as pointed out above, there will be a great stimulation in traffic, which the carriers have overlooked and as to which they have made no allegations, and accordingly a corresponding increase in revenue rather than any loss whatever. Moreover the carriers have the right to resort to the Interstate Commerce Commission and ask for further relief in case any such loss should appear. If it be said that there may be a temporary loss to the carriers, it is on the other hand true, that if any interlocutory injunction is made as sought by the petitioners herein, the loss to the public, in case the order should afterwards be held valid, would be at least
as great as the decrease in rate claimed by the carriers,
156 and would be certain to ensue to the public, while the loss claimed by the carriers is, at best, problematical.

22. It is contended that the carriers herein have not offered facts of such probative force as would justify this court in issuing an interlocutory injunction or postponing the operation of the order of the Interstate Commerce Commission, duly made in the course of its duties as prescribed by law, and that the petitioners herein seem to have overlooked entirely the great inconvenience entailed to the public that postponement of compliance with the order of the commission will create. The making of such an interlocutory injunction as is sought will frustrate the purposes of the commission by retarding the stimulation of business and the return to normal conditions.

23. There is a much broader and more far reaching end to be served by compliance with the order of the commission than the mere saving to the purchasers of scrip-coupon tickets of a 20% reduction, as was shown by the evidence before the commission, namely, the stimulation of business of the whole country as well as the increase of revenue to the carriers, and the hastening of a return to normal conditions, all of which will be prevented and indefinitely

postponed if such an interlocutory injunction should issue in this case.

157 Wherefore your deponent, on behalf of the intervening respondents herein, respectfully prays that the interlocutory injunction requested by the petitioners herein be denied.

SAMUEL BLUMBERG.

Sworn to before me this 12th day of April, 1923.

[SEAL.]

ARTHUR M. LOEB, *Notary Public*.

New York County clerk's No. 192; New York County register's No. 4031. Commission expires March 30, 1924.

158 In United States District Court.

Also on the said fifteenth day of May, A. D. 1923, the following petition to intervene is filed:

Petition to intervene as petitioners by Wabash Railway Company, Pere Marquette Railway Company, and Chicago, Indianapolis & Louisville Railway Company.

Filed May 15, 1923.

To the Honorable the Judges of the District Court of the United States for the District of Massachusetts:

Respectfully represents the Wabash Railway Company, a corporation of the State of Indiana; the Pere Marquette Railway Company, a corporation of the State of Michigan; and the Chicago, Indianapolis & Louisville Railway Company, a corporation of the State of Indiana, that they are corporations organized and existing under the laws of the respective States above named; that they are common carriers engaged in the business of operating steam railroads in interstate commerce and are subject to the provisions of the interstate commerce act and acts in amendment thereof; that they are members of the Eastern group as established by the Interstate Commerce Commission in Increased Rates, 1920, pursuant to the provisions of section 15a of the interstate commerce act; that they were parties respondent and parties in interest to the proceedings before the Interstate Commerce Commission in which was made the order of March 6, 1923, which is sought to be enjoined, set aside, annulled, and suspended in the above-entitled proceeding.

Wherefore the above-named corporations respectfully pray for leave to intervene as parties petitioner in the above-entitled cause.

WABASH RAILWAY COMPANY,
PERE MARQUETTE RAILWAY COMPANY,
CHICAGO, INDIANAPOLIS & LOUISVILLE
RAILWAY COMPANY,

By their attorneys, CHAS. F. CHOATE, JR.,
FREDERICK H. NASH,
JAMES GARFIELD.

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Thereupon, on the same day, the foregoing petition to intervene is allowed by the court, the Honorable Judges Julian W. Mack, George F. Morris, and Elisha H. Brewster, sitting.

159 Also on the said fifteenth day of May, A. D. 1923, the following final decree is entered:

In United States District Court.

Final decree.

May 15, 1923.

Before the Honorable Julian W. Mack, United States circuit judge, and the Honorable George F. Morris and the Honorable Elisha H. Brewster, United States district judges, holding the District Court pursuant to urgent deficiencies act (38 Stat. 219).

This cause came on to be heard May 15, 1923, on the application of the petitioners for an injunction and the motion of the United States to dismiss the petition and the answers of the Interstate Commerce Commission, the National Council of Traveling Salesmen's Associations, and Garment Salesmen's Associations, Inc., intervening respondents, and upon the record of the proceedings before the Interstate Commerce Commission in Interchangeable Mileage Ticket Investigation, No. 14104, the affidavit of Samuel Blumberg and the two affidavits of Julius Parmalee, said record and said affidavits being the only evidence introduced at the hearing, it having been agreed at the argument that the cause should be deemed submitted for final hearing, and was argued by counsel and submitted to the court; thereupon, upon consideration thereof, it was ordered,

adjudged, and decreed as follows, viz:

160 1. That the motion of the United States to dismiss the petition be, and the same is hereby, denied.

2. That the application for a permanent injunction be, and the same is hereby, granted as prayed in the petition, and that the order of the Interstate Commerce Commission in the Interchangeable Mileage Ticket Investigation, No. 14104, on the docket of the commission, entered March 6, 1923, and referred to in the petition, be, and the same is hereby, permanently and forever annulled and suspended; and that the respondents and each of them, their officers, members, examiners, agents, and attorneys, and any or all persons whosoever be permanently and forever restrained and enjoined from enforcing or in any manner attempting to enforce or carry out the said order or any of the terms thereof.

By the Court:

JULIAN W. MACK,
United States Circuit Judge.

GEORGE F. MORRIS,

ELISHA H. BREWSTER,

United States District Judges.

Approved as to form only.

ROBERT O. HARRIS,

For United States of America.

161 From the foregoing final decree the National Council of Traveling Salesmen's Associations, and Aaron M. Loeb, as president; Samuel H. Liberman, as 1st vice president; Leon S. Fox, as 2nd vice president; Selden A. McOmber, as 3rd vice president; George W. Allen, as 4th vice president; Sol Wolerstein, as secretary; and Archie E. Foise, as treasurer; and Garment Salesmen's Association, Inc., intervening respondents, and the United States of America respondent, and Interstate Commerce Commission, intervening respondents, claim an appeal to the Supreme Court of the United States, and the National Council of Traveling Salesmen's Associations et al. give good and sufficient security that they will prosecute their appeal to effect and answer all costs if they fail to make their appeal good, and said appeals are allowed accordingly.

162 In United States District Court.

Opinion.

April 23, 1923.

Before Mack, circuit judge; Morris and Brewster, district judges.

PER CURIAM:

While this case came on to be heard on motion of petitioners for a temporary injunction to restrain the enforcement of an order of the Interstate Commerce Commission, and on motion of the United States to dismiss the petition, it was agreed at the argument that the cause should be deemed submitted for final hearing. The case involves the constitutionality of the act. The suit is to annul an order of the Interstate Commerce Commission made March 6, 1923.

The Interstate Commerce Commission was directed, under the amendment of section 22 of the interstate commerce act, approved August 18, 1922, to require, after notice and hearing, each carrier by rail subject to the act to issue at such offices as may be prescribed by the commission interchangeable mileage or scrip coupon tickets at just and reasonable rates, good for passenger carriage upon passenger trains of all carriers by rail subject to the act, with the privilege of granting certain exemptions as provided therein.

Pursuant to this amendment proceedings were instituted by the commission, and as a result thereof the carriers named, except as exempted by the commission, were ordered to issue nontransferable interchangeable scrip coupon tickets in denominations of ninety dollars, obtainable at a reduction of twenty per cent from the face value thereof.

Although the carriers opposed any reduction in rates for the scrip coupons below the standard rates, it is clear from the record that the commission proceeded on the assumption that the spirit and theory of the congressional amendment required them to order the scrip coupons to be issued at reduced rates, at least in so far as such rates could not be deemed confiscatory. There is no finding in the

record that would indicate that the commission, if it had
 163 exercised an independent judgment apart from what it conceived to be the plain spirit and theory of the amendment, would have ordered the scrip coupons to be issued at reduced rates. The only finding of the commission that could possibly be relied upon as indicating that the commission exercised an independent judgment is the statement in the majority report that "in addition to the obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established, at least for an experimental period." But this finding is followed by the statement that "in no other way can the apparent purpose of the law be given practical effect." It would seem fairly plain, therefore, that the furthest the commission goes in its finding is to conclude that the record might justify the issuance of coupons at reasonably reduced rates for an experimental period; but there is nothing to indicate that the commission, if it had felt free to exercise its own judgment, would have assumed the responsibility for establishing the reduced rate, even for an experimental period.

It is not entirely clear whether the majority of the commission acted under an interpretation of the amendment that it was mandatory upon them so to reduce the rates for interchangeable scrip coupon tickets or upon an assumed desire of the Congress, though not expressed by the amendment in mandatory form, that they should so do. In our judgment, the amendment is not mandatory in this respect. It does not prescribe that such coupons shall be issued at a reduced rate. Attempts to fix specific reduced rates by legislation were defeated. If the Congress had intended that some reduction should be mandatory, leaving only the amount thereof to be determined by the commission under the phrase "just and reasonable," such intent could readily have been expressed in clear language. The fair and natural interpretation of the language used by the Congress makes mandatory the issuance of such coupons at just and
 164 reasonable rates, but the ultimate if not the original determination of what shall be just and reasonable rates for such coupons is placed entirely upon the commission. If, therefore, the commission acted upon a different interpretation of the amendment, an error of law was the basis of its action and order. "The question is of the meaning of a statute, and upon that, of course, the courts must decide for themselves." *Chicago, Milwaukee & St. Paul Ry. Co. v. McCaull-Dinsmore Co.*, 253 U. S. 97. If, on the other hand, it acted upon the interpretation which we have found to be the correct interpretation of the amendment, but based its conclusions not upon its own independent judgment, but upon what it believed to be the spirit and purpose of the act, which, if it means something other than a sound interpretation of the act, must mean some supposed desire of the Congress, it acted contrary to law in abdicating the functions vested in it.

In either case its order is without warrant of law and for this reason must be annulled.

The amendment itself is attacked as unconstitutional, in that in requiring the interchangeable scrip coupons it compels an interchange of credit between the railroads and thereby compels a service at the risk of complete financial loss in case of the insolvency of the road from which the scrip may have been purchased. In our judgment, the decisions of the Supreme Court upholding the Carmack amendment (Atlantic Coast Line R. R. Co. v. Riverside Mills, 219 U. S. 186), the right of a legislature to compel the interchange of cars (Michigan Central R. R. Co. v. Michigan R. R. Commission, 236 U. S. 615), and of Congress to compel the establishment of joint rates (St. Louis Southwestern Ry. Co. v. U. S., 245 U. S. 136) necessarily involve the determination of the right to compel an interchange of credits as between the roads despite the possible loss from such an insolvency. As the commission points out, the railroads themselves have maintained the interchangeable scrip coupons established under Government operation, and have thus voluntarily established a similar interchange of credits over all roads except electric and short line carriers. Under the present amendment the extent of such credit interchange is left to the commission, and must, of course, be reasonable, but in requiring the interchange in respect to the scrip coupons the action of Congress must be upheld as a constitutional exercise of power within the aforesaid decisions.

A permanent injunction will therefore be granted against the enforcement of the order of the commission.

JULIAN W. MACK, *Circ. Judge.*

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In United States District Court.

Petition for appeal by National Council of Traveling Salesmen's Associations et al.

Filed May 15, 1923.

National Council of Traveling Salesmen's Associations, an unincorporated association, and Aaron M. Loeb, as president; Samuel H. Liberman, as first vice president; Leon S. Fox, as second vice president; Selden A. McOmber, as third vice president; George W. Allen, as fourth vice president; Sol Wolerstein, as secretary; and Archie E. Foise, as treasurer thereof; and Garment Salesmen's Association, Inc., intervening respondents, feeling themselves aggrieved by the final order or decree of the District Court made and entered May 15, 1923, pray an appeal to the Supreme Court of the United States therefrom.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

Respondents pray that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

SAMUEL BLUMBERG,
HOKE SMITH,
POWERS & HALL,
JAMES N. CLARK,

*Solicitors for National Council of Traveling
Salesmen's Associations et al.*

168

In United States District Court.

Assignment of errors by and on behalf of National Council of Traveling Salesmen's Associations, et al.

Filed May 15, 1923.

National Council of Traveling Salesmen's Association, an unincorporated association, and Aaron M. Loeb, as president; Samuel H. Liberman, as first vice president; Leon S. Fox, as second vice president; Selden A. McOmber, as third vice president; George W. Allen, as fourth vice president; Sol Wolerstein, as secretary; and Archie E. Foise, as treasurer thereof; and Garment Salesmen's Association, Inc., intervening respondents, now come, by their counsel, and in connection with their petition for appeal file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered May 15, 1923.

The District Court erred:

I. In denying the motion of the United States to dismiss the petition and in not sustaining the motion.

II. In deciding, holding, and adjudging as follows:

169 Although the carriers opposed any reduction in rates for the scrip coupons below the standard rates, it is clear from the record that the commission proceeded on the assumption that the spirit and theory of the congressional amendment required them to order the scrip coupons to be issued at reduced rates, at least in so far as such rates could not be deemed confiscatory. There is no finding in the record that would indicate that the commission, if it had exercised an independent judgment apart from what it conceived to be the plain spirit and theory of the amendment, would have ordered the scrip coupons to be issued at reduced rates.

III. In deciding, holding, and adjudging as follows:

The only finding of the commission that could possibly be relied upon as indicating that the commission exercised an independent judgment is the statement in the majority report that "in addition to

the obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established, at least for an experimental period." But this finding is followed by the statement that "in no other way can the apparent purpose of the law be given practical effect." It would seem fairly plain, therefore, that the furthest the commission goes in its finding is to conclude that the record might justify the issuance of coupons at reasonably reduced rates for an experimental period; but there is nothing to indicate that the commission, if it had felt free to exercise its own judgment, would have assumed the responsibility for establishing the reduced rate, even for an experimental period.

IV. In deciding, holding, and adjudging as follows:

It is not entirely clear whether the majority of the commission acted under an interpretation of the amendment that it was mandatory upon them so to reduce the rates for interchangeable script coupon tickets, or upon an assumed desire of the Congress, though not expressed by the amendment in mandatory form, that they should so do.

V. In deciding, holding, and adjudging as follows:

That either "the commission acted upon a different interpretation of the amendment" and thus that "an error of law was the basis of its action and order" or that it "based its conclusions not upon its own independent judgment, but upon what it believed to be the spirit and purpose of the act, which, if it means something other than a sound interpretation of the act, must mean some supposed desire of the Congress," and thus "acted contrary to law in abdicating the functions vested in it."

"In either case its order is without warrant of law and for this reason it must be annulled."

VI. In not sustaining the order of the Interstate Commerce Commission.

VII. In not dismissing the petition.

VIII. In issuing the permanent injunction and in permanently annulling and suspending the order of the Interstate Commerce Commission.

Wherefore, respondents and each of them pray that the final order or decree of the District Court may be reversed, annulled, and set aside, with directions that the permanent injunction shall be dissolved and the petition dismissed, and for such other and further order as may be appropriate.

SAMUEL BLUMBERG,
HOKE SMITH,
POWERS & HALL,
JAMES N. CLARK,

*Solicitors for National Council of Traveling
Salesmen's Associations et al.*

171 In United States District Court.

Order allowing appeal of National Council of Traveling Salesmen's Associations et al.

May 15, 1923.

In the above-entitled cause, National Council of Traveling Salesmen's Associations, an unincorporated association, and Aaron M. Loeb, as president; Samuel H. Liberman, as first vice president; Leon S. Fox, as second vice president; Selden A. McOmber, as third vice president; George W. Allen, as fourth vice president; Sol Wolerstein, as secretary; and Archie E. Foise, as treasurer thereof; and Garment Salesmen's Association, Inc., intervening respondents, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

172 It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered to the Supreme Court of the United States; and

It is further ordered and decreed that the appellants, National Council of Traveling Salesmen's Associations et al. have ten (10) days to file their bond on appeal herein in the amount of two hundred and fifty dollars.

JULIAN W. MACK,
United States Circuit Judge.
GEORGE F. MORRIS,
ELISHA H. BREWSTER,
United States District Judges.

173 In United States District Court.

Petition for appeal by United States of America and Interstate Commerce Commission.

Filed May 15, 1923.

United States of America, respondent, and Interstate Commerce Commission, intervening respondent, feeling themselves aggrieved by the final order or decree of the District Court made and entered May 15, 1923, pray an appeal to the Supreme Court of the United States therefrom.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

Respondents pray that the transcript of the record, proceedings and papers on which the final order or decree was made and entered

duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

ROBERT O. HARRIS,
United States Attorney, District of Massachusetts.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

In United States District Court.

Assignment of errors by and on behalf of the United States of America and Interstate Commerce Commission.

Filed May 15, 1923.

United States of America, respondent, and Interstate Commerce Commission, intervening respondent, now come, by their respective counsel, and in connection with their petition for appeal file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the final order or decree of the District Court entered May 15, 1923.

The District Court erred:

1. In denying the motion of the United States to dismiss the petition and in not sustaining the motion.
- 174 II. In deciding, holding, and adjudging as follows:

Although the carriers opposed any reduction in rates for the scrip coupons below the standard rates, it is clear from the record that the commission proceeded on the assumption that the spirit and theory of the congressional amendment required them to order the scrip coupons to be issued at reduced rates, at least in so far as such rates could not be deemed confiscatory. There is no finding in the record that would indicate that the commission, if it had exercised an independent judgment apart from what it conceived to be the plain spirit and theory of the amendment, would have ordered the scrip coupons to be issued at reduced rates.

- III. In deciding, holding, and adjudging as follows:

The only finding of the commission that could possibly be relied upon as indicating that the commission exercised an independent judgment is the statement in the majority report that "in addition to the obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established, at least for an experimental period." But this finding is followed by the statement that "in no other way can the apparent purpose of the law be given practical effect." It would seem fairly plain, therefore, that the furthest the commission goes in its finding is to conclude that the record might justify the issuance of coupons at reasonably reduced rates for an experimental period; but there is nothing to indicate that the commission, if it had felt free to exercise its own

judgment, would have assumed the responsibility for establishing the reduced rate, even for an experimental period.

IV. In deciding, holding, and adjudging as follows:

It is not entirely clear whether the majority of the commission acted under an interpretation of the amendment that it was mandatory upon them so to reduce the rates for interchangeable scrip coupon tickets, or upon an assumed desire of the Congress, though not expressed by the amendment in mandatory form, that they should so do.

V. In not sustaining the order of the Interstate Commerce Commission.

VI. In not dismissing the petition.

VII. In issuing the permanent injunction.

Wherefore respondents and each of them pray that the final order or decree of the District Court may be reversed, annulled, and set aside, with directions that the permanent injunction shall be dissolved and the petition dismissed, and for such other and further order as may be appropriate.

ROBERT O. HARRIS,
United States Attorney, District of Massachusetts.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
P. J. FARRELL,
Solicitor for the Interstate Commerce Commission.

175

In United States District Court.

Order allowing appeal of United States of America and Interstate Commerce Commission.

Filed May 15, 1923.

In the above-entitled cause United States of America, respondent, and Interstate Commerce Commission, intervening respondent, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the District Court, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered to the Supreme Court of the United States.

JULIAN W. MACK,
United States Circuit Judge.
GEORGE F. MORRIS,
ELISHA H. BREWSTER,
United States District Judges.

176

In United States District Court.

Notice of appeal.

Filed May 17, 1923.

To the Honorable Jay R. Benton, Attorney General of the Commonwealth of Massachusetts:

You are hereby notified that on May 15th, 1923, the appeal of the National Council of Traveling Salesmen's Associations et al. and Garment Salesmen's Association, Inc., intervening respondents, was allowed from the final decree of the District Court to the Supreme Court of the United States, and that the order allowing the said appeal makes the same returnable within thirty days from the date thereof.

This notice is given to you pursuant to urgent deficiencies act, October 22, 1913 (38 U. S. Stat. L. 221).

SAMUEL BLUMBERG,
HOKE SMITH,
POWERS & HALL,
JAMES N. CLARK,

Solicitors for National Council of Traveling Salesmen's Associations et al. and Garment Salesmen's Association, Inc., Appellants.

May 17th, 1923.

Service of a copy of the within notice is hereby admitted and acknowledged this 17th day of May, 1923.

JAY R. BENTON,
Attorney General of the Commonwealth of Massachusetts.

177

In United States District Court.

Notice of appeal.

Filed May 17, 1923.

To the Honorable J. R. Benton, Attorney General of the State of Massachusetts:

You are hereby notified that on May fifteenth, 1923, an appeal was allowed from the final decree of the District Court to the Supreme Court of the United States and that the order allowing the appeal makes the same returnable within thirty (30) days from the date thereof.

This notice is given you pursuant to urgent deficiencies act, October 22, 1913 (38 U. S. Stat. L. 221).

ROBERT O. HARRIS,
United States Attorney, District of Massachusetts.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

Service of a copy of the within notice is hereby admitted and acknowledged this 17th day of May, 1923.

JAY R. BENTON,
Attorney General of Massachusetts.

178 In United States District Court.

Præcipe filed by the United States and the Interstate Commerce Commission.

Filed May 29, 1923.

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal of the United States of America and Interstate Commerce Commission and include therein in the order given below, the following matter, viz:

1. Petition and exhibits.
2. Motion of the United States to dismiss.
3. Appearance and answer of the Interstate Commerce Commission.
4. Affidavits offered by petitioners.
5. Certified copy of record before the Interstate Commerce Commission.
6. Opinion.
7. Journal entries in their appropriate order.
8. Final decree.
9. Petition for appeal.
10. Assignment of errors.
11. Order allowing appeal.
12. Order extending time to prepare transcript and docket appeal.
13. Notice of appeal to Attorney General of Massachusetts.
14. Præcipe for record.

ROBERT O. HARRIS,
United States Attorney, District of Massachusetts.
BLACKBURN ESTERLINE,
Assistant to the Solicitor General.
P. J. FARRELL,
Solicitor for Interstate Commerce Commission.

Service of a copy of the within præcipe is hereby admitted and acknowledged this 28th day of May, 1923.

CHAS. F. CHOATE, Jr.,
Solicitor for Appellees and Intervening Appellees.

179 In United States District Court.

Appellees' præcipe for record.

Filed June 4, 1923.

To the Clerk:

Please include in the transcript of the record on appeal in the above-entitled cause in addition to the matters set forth in the præ-

cipe for record heretofore filed by the United States of America and the Interstate Commerce Commission the following, viz:

1. Petition of National Council of Traveling Salesmen's Associations and others to intervene, together with order granting leave to intervene and order confirming said order.
2. Appearance and answer of the National Council of Traveling Salesmen's Associations and others, intervening respondents.
3. Petition of the Baltimore & Ohio Railroad Company to intervene, together with order granting leave to intervene.
4. Petition of Wabash Railway Company, Pere Marquette Railway Company, and Chicago, Indianapolis & Louisville Railway Company to intervene, together with order granting leave to intervene.
5. Petition for appeal on behalf of the National Council of Traveling Salesmen's Associations and others and Garment Salesmen's Associations, Inc.
6. Order allowing appeal of National Council of Traveling Salesmen's Associations and others and Garment Salesmen's Associations, Inc.
7. Assignment of errors on behalf of National Council of Traveling Salesmen's Associations and others and Garment Salesmen's Associations, Inc.
- 180 8. Notice of appeal to attorney general of Massachusetts on behalf of National Council of Traveling Salesmen's Associations and others and Garment Salesmen's Associations, Inc.
9. Order extending time to prepare transcript and docket appeal on behalf of the National Council of Traveling Salesmen's Associations and others and Garment Salesmen's Associations, Inc.
10. Appellees' præcipe for record.

CHAS. F. CHOATE, JR.,
Solicitor for Appellees.

Service of a copy of the within præcipe is hereby admitted and acknowledged this 4th day of June, 1923.

ROBERT O. HARRIS,
United States Attorney, District of Massachusetts.
POWERS & HALL,
Solicitors for National Council of Traveling Salesmen's Associations and Garment Salesmen's Associations, Inc., intervening respondents.

181 In United States District Court.

Præcipe for record.

Filed June 14, 1923.

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal of the National Council of Travel-

ing Salesmen's Associations, an unincorporated association, and Aaron M. Loeb, as president; Samuel H. Liberman, as first vice president; Leon S. Fox, as second vice president; Selden A. McOmber, as third vice president; George W. Allen, as fourth vice president; Sol Wolerstein, as secretary; and Archie E. Foise, as treasurer thereof; and Garment Salesmen's Association, Inc., and include therein, in the order given below, the following matter, viz:

1. Petition and exhibits.
2. Motion and petition to intervene, together with order granting leave to intervene and order confirming said order.
3. Appearance and answer.
4. Affidavits offered by petitioners.
- 182 5. Affidavit of Samuel Blumberg.
6. Certified copy of record before the Interstate Commerce Commission.
7. Opinion.
8. Journal entries in their appropriate order.
9. Final decree.
10. Petition for appeal.
11. Assignment of errors.
12. Order allowing appeal.
13. Order extending time to prepare transcript and docket appeal.
14. Notice of appeal to Attorney General of Massachusetts.
15. Præcipe for record.

HOKE SMITH,
SAMUEL BLUMBERG,
POWERS & HALL,
JAMES N. CLARK,

*Solicitors for National Council of Traveling
Salesmen's Associations et al.*

Service of a copy of the within præcipe is hereby admitted and acknowledged this 14th day of June, 1923.

CHAS. F. CHOATE, JR. (by J. G.),
Solicitor for Appellees.

183 *Bond on appeal for \$250.*

Filed and approved May 22, 1923.

[Omitted in printing.]

190 *Condensed statement of evidence before Interstate Commerce Commission.*

[Filed July 26, 1923.]

Before the Interstate Commerce Commission.

Docket No. 14104.

Interchangeable mileage ticket investigation.

HEARING ROOM, I. C. C. BUILDING,
Washington, D. C., Tuesday, September 26, 1922.

The above-entitled matter came on for hearing at 10 o'clock a. m., pursuant to notice.

Present: Commissioners Meyer, Lewis, and Cox.

Present also: Chief Examiner R. E. Quirk, Dr. M. O. Lorenz, director of statistics, and Mr. A. Wylie, director of accounts.

Proceedings:

Commissioner MEYER. Gentlemen, this is a hearing in Docket No. 14104, the order in which sufficiently recites the purpose of the hearing. Without further preliminaries, we will listen to the first witness.

C. A. Fox, a witness called by the respondents, testified:

I reside in Chicago, Illinois. I am chairman of the Central Passenger Association, and have been since March, 1920. I have been in the railroad service since 1887. From 1897 to 1900, I was chief clerk of the mileage bureau of the Central Passenger Association; from 1900 to 1918 I was secretary of the Central Passenger Association and chief clerk of its mileage bureau, and from March, 1918, to March, 1920, I was with the division of traffic (passenger), United States Railroad Administration, Washington, D. C.

In this proceeding I represent 168 railroads, 149 of which are class 1 roads and 19 of which are class 2 roads, covering approximately 225,000 miles.

There is no public advantage in the sale of both mileage and scrip tickets. The present forms of scrip coupon tickets, now issued generally in \$15, \$30, and \$90 denominations, fully meet the requirements of the new law, although such forms of tickets have never been satisfactory to the carriers.

These scrip books are issued in coupon form and are equivalent to currency, coupons being detached to cover the value of transportation furnished at normal one-way fares, published in regular tariffs filed with the commission. The coupons are accepted by conductors on trains; but, if holder desires to travel between two competitive points, by a carrier or carriers whose distance is longer than the

direct or short line, coupons of value equivalent to the through fare via the direct or short line are detached by the ticket agent, and a passage ticket of ordinary one-way form is issued in exchange therefor. The holder thus obtains the benefit of short-line fares via the longer routes between all competitive points in the United States to the same extent as possible by purchase of ordinary one-way tickets at normal fares.

The carriers contend there should be no reduction in fares. The present interchangeable scrip ticket meets all requirements as far as the varying rate levels are concerned.

At no time since the passage of the transportation act have the carriers as a whole earned the net return contemplated by that act. In this relation there is submitted herewith, as Exhibit No. 4, preliminary report of revenue and expenses of class 1 roads and large switching and terminal companies, July, 1922, and seven months' period ended July 31st, 1922, compared with same period of 1921. (The paper referred to was received in evidence, marked "Carriers' Exhibit No. 4, Witness Fox," and is side page 295 hereof.)

And as Exhibit No. 5, net railway operating income compared with 6 per cent on tentative valuation, class 1 roads and large switching and terminal companies, January, 1922, to July, 1922, 192 prepared by the Bureau of Railway Economics. (The paper referred to was received in evidence, marked "Carriers' Exhibit No. 5, Witness Fox," and is side page 296 hereof.)

Any form of reduced rate mileage or scrip ticket good for nationwide use on all the railroads of the country will inevitably result in a substantial reduction in passenger revenues, the extent of which will vary according to the percentage of reduction from the one-way fare and the denomination of the ticket. It is practically impossible to accurately estimate the amount of this reduction, because there has never been a reduced rate ticket which was good for use on all roads throughout the entire country. If such a ticket be introduced, a great proportion of the one-way travel between large commercial centers such as Chicago and New York, New York and Orleans, Chicago and Denver, San Francisco, etc., and theatrical, Chautauqua, and other similar traffic will be quick to take advantage of such a ticket. In other words, the larger the scope of territory in which the ticket can be used, the greater will be the inroads upon the passenger revenue of the carriers.

The gross passenger revenues for the year 1921 were for class 1 roads \$1,152,635,016. The estimated passenger revenues for the year 1922, based on I. C. C. reports for the first six months, will be \$1,070,167,869, or a prospective decrease of \$82,467,147.

These figures were also compiled by the Bureau of Railway Economics.

These passenger revenues include commutation and surcharge, but exclude mail and express for both years. This showing results in the face of the wiping out of the war tax January 1, 1922.

Some years ago when mileage tickets were in effect and reductions in various degrees from the basic rate per mile were accorded in different parts of the country, even though such mileage tickets were restricted to smaller territorial limits and were not interchangeable between all lines in the same territory, an average of not less than 20 per cent of the total passenger revenue in certain sections of the country was derived from mileage tickets; in fact, on some lines, as high as 60 per cent of the total passenger traffic was so moved.

Confirming these statements, the record shows that for the fiscal year ending June 30, 1917, in southeastern territory a major portion of the traffic moving between principal commercial centers traveled on mileage tickets, as illustrated by the following: Between Jacksonville, Fla., and Washington, D. C., 85 per cent; between Cincinnati, Ohio, and Tampa, Florida, 95 per cent; between Tampa, Florida, and New Orleans, Louisiana, 80 per cent; between Washington, D. C., and New Orleans, Louisiana, 93 per cent; between New Orleans, Louisiana, and Jacksonville, Florida, 60 per cent; between Louisville, Kentucky, and Memphis, Tennessee, 68 per cent; between St. Louis, Missouri, and Memphis, Tennessee, 47 per cent; between Memphis, Tennessee, and Vicksburg, Mississippi, 50 per cent; between New Orleans, Louisiana, and Memphis, Tennessee, 60 per cent; between Washington, D. C., and Raleigh, North Carolina, 53 per cent; between Cincinnati, Ohio, and Raleigh, North Carolina, 72 per cent; and between Washington, D. C., and Savannah, Georgia, 71 per cent. These points are in southern territory, because the data were compiled several years ago by the southeastern carriers for use in a proceeding before this commission. I use the data here because it is available. During the same time interchangeable mileage tickets were in use in central freight association territory. The percentages there did not run as high as the foregoing percentages in southeastern territory because the reduction in the rate obtainable by use of the books was quite material in southeastern territory, was more than in central freight association territory.

From the foregoing it is apparent that any reduced rate mileage or scrip ticket will practically supersede the normal one-way fares between all commercial centers of the country, materially reducing the present aggregate revenues which do not now meet the necessity of the carriers, nor the expectation of the commission from a revenue standpoint in their recent general rate investigation.

Another inequitable and discriminating feature of a reduced rate scrip or mileage ticket would be that in view of the long distances covered by journeys in this country, under almost any priced book so far suggested, it would be possible by the use of a scrip book, and with practically the same initial investment, to accomplish a one-way journey between two given points at a less cost than by purchase of a regular one-way ticket, this producing either a discrimination or a reduction in the one-way fare. The lower the price

of the book, the more cases of this kind would be produced. The cost of handling passengers on reduced mileage or scrip tickets will exceed considerably the cost of performing service for a passenger paying the normal fare and using the ordinary form of one-way ticket, and it is not clear how it can be justifiably concluded that, when the present normal basis fare has failed to produce the results anticipated by previous decisions of the commission, a mileage or scrip ticket sold at a fare below such normal basic fare per mile can be construed as either just or reasonable.

It has been alleged that carriers would derive substantial benefit from the use of the money paid in advance for mileage or scrip books, on which service would not be performed for a considerable time after purchase. A fund created in this manner would be divided into comparatively small totals among the large number of selling carriers. These sums would be constantly changing balances, subject to innumerable withdrawals on account of claims for partially used tickets returned by purchasers for redemption, and subject to hundreds of monthly settlements between roads for coupons of books honored by foreign roads. Of the total mileage revenue only a comparatively small per cent would remain constantly in the possession of the carriers as a daily average balance. In view of the foregoing considerations it must be apparent that the contentions with respect to this feature have no substantial merit.

It has been uniformly recognized by the railroad managements since the inception of mileage tickets that they were the most pernicious and unbusinesslike form of transportation in use, because of their discriminatory character and susceptibility to all kinds of irregularities and manipulations. It was impossible for various reasons for the carriers as a whole to abolish the use of mileage tickets, nevertheless there was a constantly growing restriction in their use to the extent that it was within the power of the carriers to so limit them. Conditions changed when the carriers were operated as a unit by the United States Railroad Administration, and recognizing the discrimination and irregular manipulation of mileage tickets, the carriers were ordered to discontinue them.

The United States Railroad Administration having accomplished during the period of Federal control what the carriers themselves were unable to accomplish prior thereto, the carriers did not, upon the return of the properties to private operation, reestablish the mileage ticket at a reduced fare, and are strongly opposed to it at the present time.

197 Any reduction in the basic fare which may be imposed upon the carriers through the installation of a mileage or scrip ticket below the normal fare will deplete the present passenger revenues, and it is the consensus of views that a reduced-rate mileage or scrip ticket will not increase the traffic to an extent offsetting the reduction in revenue.

In 1907 the legislature of a number of Western States passed what are commonly known as "Two-cent fare acts," reducing passenger fares from three cents to two cents per mile. That is about 1907. Some were later and some were earlier. In the case of one large western railroad passenger fares were reduced in 1907 from three cents to two cents per mile on 75.79 per cent of its total mileage. Notwithstanding the reduced fare, the total number of passengers carried during the fiscal year ended June 30, 1908, increased only 2.16 per cent over the number carried in the preceding fiscal year when the basic passenger fare was three cents per mile.

The evidence of this character necessarily is largely fragmentary. There has never been any considerable volume of data of this character, to our knowledge, prepared.

In April, 1914, the passenger fares on the same lines in South Dakota were reduced from three cents per mile to two and a half cents per mile, a reduction of 16.16 per cent. Notwithstanding that substantial reduction, the number of passengers carried one mile intrastate in South Dakota for the three months immediately following the reduction decreased 3.42 per cent, as compared with the corresponding months in the previous year in which a rate of three cents per mile was in effect. These lines were the Chicago & Northwestern, which has 1,230 miles of railroad in South Dakota out of a total of 4,131 miles in that State.

198 Further substantiation is furnished by the experience of one of the southeastern carriers, the Louisville & Nashville, which operates 180 miles of railroad in Illinois out of a total of 12,662 miles in that State. In Illinois passenger fares were reduced from three cents to two cents per mile, effective July 1, 1907, but the operations of the carrier in question for the last six months of the calendar year, 1907 (the first six months after the reduced rate became effective), compared with the last six months of 1906 (when the rate was three cents), showed that while the number of passengers carried in Illinois increased 7.13 per cent, there was likewise an increase in the number of passengers carried by that same carrier in other States where the passenger fare had not been reduced; that is, in Tennessee, an increase of 19.71 per cent; in Alabama, 9.82 per cent; in Georgia, 23.67 per cent; and in Florida, 14.21 per cent.

Using the experience of this same carrier for further illustration, passenger fares on its lines in Alabama were reduced from three cents to two and a half cents per mile, effective June 1, 1909, but its fare in Georgia remained at three cents per mile. Comparing the nine months' period ended February 28, 1910, with the nine months' period ended February 28, 1909, the number of passengers carried by it in Alabama showed an increase of 12.52 per cent, while in Georgia, with no reduction in the basic rate, the number of passengers carried by it increased 13.45 per cent and the revenue results for these same periods showed a decrease of 1.35 per cent in Alabama and an increase of 12.24 per cent in Georgia.

The Louisville & Nashville has 999 miles of railroad in Tennessee, 1,275 miles in Alabama, 215 miles in Georgia, and 246 miles in Florida. The total railroad mileage in these States is: Tennessee, 3,791 miles; Alabama, 4,981 miles; Georgia, 6,303 miles; and Florida, 4,056 miles.

199 The Louisville & Nashville in Illinois might not be as complete as we would like to make it, but we think it is typical of what will happen under identical conditions, or under conditions where there will be a reduction such as is sought here. I think it would practically reflect the reduction as to all the roads in Illinois, even though it might not occur on every road there. That is just conjecture, but I think it would be reasonably typical. We picked out that road because it was the only road that had compiled data of that character. They had occasion to compile that data some years ago, and we used it because it was available.

Possibly it would not be fair to base a conclusion upon the statement as to three months in South Dakota unless this statement clearly indicated the condition in that State for a period of time that could be averaged, but we produced the best we had available at the time of the preparation of the report. I do not know what months the report covered when I say the three months following the passage of this act, because I do not know the date when the law became effective.

The three months used in the South Dakota example were the three months immediately following the rate reduction. They were not selected for any particular purpose, but the information was given because it had been compiled some years ago, and was adopted here in our report as affording the commission the most information that we could contribute in connection with this matter. We produce the best we have available.

If mileage tickets at a special reduction are sold to the general public, past experience demonstrates that theatrical companies, circuses, concert companies, bands, and other public entertainments and other organized traffic will demand like special class legis-
200 lation for their transportation. Wherever a reduced mileage rate prevailed, the traveling public to a considerable extent could not be convinced that the same basis should not prevail for all regular passenger travel. The pressure was always for a downward revision.

The carriers have repeatedly asserted that a reduction in the basic fare through the sale of reduced rate mileage or scrip tickets, or otherwise, would not appreciably stimulate traffic. An outstanding proof of this is furnished by the withdrawal of the war tax of 8 per cent of the transportation charges, effective January 1, 1922. The cancellation of this charge was equivalent to making a horizontal reduction in passenger fares on all carriers in the United States, but, instead of stimulating traffic, the passenger revenues for 1922 will show a decrease of approximately \$82,500,000, based upon the decrease already shown for the first six months of 1922.

The testimony of the carriers would be incomplete if they failed to call particular attention to what they consider one of the most important phases of this whole question, namely, discrimination. Any form of mileage or scrip ticket at a reduced fare will discriminate against and unduly prejudice the interests of eighty per cent of the traveling public, assuming that only twenty per cent will travel on mileage or scrip tickets. Such tickets, sold at a discount, would be used by those best able to pay the normal fares. The farmer, artisan, school-teacher, clerk, laboring man, and other casual traveler would not, on account of their infrequent trips and the price involved, buy mileage or scrip tickets. The commercial man, who is out on business, earning his living in that way, and the business man and others making frequent trips between commercial centers can afford and would purchase mileage or scrip tickets, thus saving a substantial difference in fare, while the casual traveler would pay the full one-way fare when traveling between the same points on the same train and in the same car.

201 The cost of preparing and printing a \$90-book to-day runs, according to the number ordered, from 40 to 60 cents apiece.

Cross-examination:

I do not know of any wholesale principle in the passenger business. The commercial travelers in the hearings have stated that the average distance traveled per day is about 50 miles. At 3.6 cents per mile, that is about \$1.80 per day. Where the wholesale principle comes in there, we are unable to determine. \$1.80 worth of transportation a day is an average. It is not a quantity proposition in any sense whatever. I can not point out to you a class of travel which might be compared to the wholesale principle as applied to freight.

The commutation fare produces a certain per car return, day in and day out. It is an adequate and satisfactory return, and affords the carrier adequate compensation therefor, and is a thoroughly defensible practice.

A mileage ticket at a reduction draws away from the normal one-way business. It does not stimulate to an appreciable degree. A ticket sold at a tourist fare is what the passenger representatives would term a created business. It is new business that they would not otherwise derive. It adds to the passenger revenues, rather than detracts from them, and there is a great difference as between the mileage, reduced rate mileage ticket, and the ticket sold at a reduction to the tourist.

Excursion tickets may be regarded as a discrimination, but in view of the fact that it creates new revenues, it would not be considered, from my viewpoint, as undue discrimination or unjust discrimination and the more revenue of that character that the carriers can put in their cars, the more profitable it is for them, which is not true of the mileage. The more mileage business we do, the more we take away from our full normal fares.

Furthermore, the mileage ticket is sold to a preferred class, a well-to-do class. They must be well to do, because of the fact that the advocates urge a book of 3,000 or 5,000 mile denominations, which requires an expenditure of \$100, \$125, or \$200 at one time, whereas the tourist tickets are sold at a nominal rate, frequently as low as two and three and four dollars, and anybody can take advantage of them. There is a wide difference as between the two classes. One should not be urged as a reason why the other should be granted.

The excursion ticket creates business because the passenger would not travel if he did not have the lower fare. I think a lower script book fare for regular movement on trains would not create business.

The experience which we have cited here shows to the contrary. You had it here when your 8 per cent war tax was taken off that transportation on the first of the year, and, as applied to the traveler as a whole, the business which is constantly moving—and which goes anyhow, to a very large extent—it does not create the additional volume of business as in the case of the summer tourist tickets and excursion business.

The ten-ride commutation ticket and the family commutation ticket all add to the daily average travel which produces that return on the carload service which we have previously alluded to. It is not as frequent as the daily passenger, but a twenty-five-ride ticket does produce averages which enable the entire commutation business to make a satisfactory net return.

We make no contention to the contrary of the statement that 85% of the traveling men are on the road every month in the year.

203 WILLIAM P. ROSE, a witness called by respondents, testified:

I am auditor of passenger accounts, Southern Railway Company, Washington, D. C., and have been since August, 1918. I entered the railroad service in 1886 at Richmond, Va., with the Richmond & Danville Railroad Company, now the Southern Railway. Served as clerk in various positions in the passenger accounting department until April, 1899, when I became chief clerk and remained in that position until August, 1918.

It is estimated, as shown herein, that the carriers would be burdened with an additional accounting expense of \$1,680,000 per annum if a reduced rate mileage or script book were placed in effect.

It has been the endeavor of the carriers for a great many years to equip their agencies with such simple forms of passage tickets to avoid inconvenience and delay to the passenger at the ticket window and to facilitate the collection of transportation on trains. In carrying out this policy agents generally are provided with card tickets with printed destinations to all points where the sales justify. To-day ninety per cent of the traffic is handled on this form of transportation, which affords the greatest measure of protection against possible loss of revenue, accomplishes the object as set forth above, and produces the utmost simplicity in accounting from every standpoint.

204 Card tickets as they come from the printer are ordinarily put up in packages of 250, and agents are often furnished with several thousand of those to a given destination at one time. For the convenience of sellers the cases containing card tickets are placed adjacent to the ticket windows, and the sale of this form of transportation is quite simple, the ticket being quickly extracted from the case, stamped, and handed to the passenger while the fare is being collected, and the transaction is closed. The daily record of the sales is based on the commencing and closing numbers, and in the same way the agent at the close of the month accounts for the entire sales in his report to the audit office as a single item; that is, reporting the commencing number at the beginning of the month and the closing number at the end of the month, the total number sold, the rate, and the amount.

In honoring a reduced rate scrip book at the ticket window there would be an entirely different procedure. It would be necessary to begin with for agents to be supplied with a distinctive form of ticket for this purpose, on which the agent would write the destination, or have separate printed forms where the traffic justified, show the initials of the issuing line, the number of the scrip book on account of which issued, stamp, and before handling the scrip book to the passenger make detachments of the required number of coupons from the scrip book, computed by adding the tariff rate to the lowest numbered coupon left in the book, and severing the detachment at the amount so found, with a possibility of error in computation.

205 On interline tickets, which would also be of a distinctive form, it would be necessary for the ticket seller to show the number of scrip book on each coupon and contract of ticket. The passenger is required to place his signature on the back of the detachment, which the agent must compare with the signature on the contract of the book, the number of the passage ticket is endorsed on the detachment, which is stamped and pinned to agent's stub of ticket for use in preparing office record and monthly report to the accounting department.

With regard to the latter feature, the agent is required to report each one of these scrip exchange passage tickets as a single item in order that he may report in connection therewith the number of the scrip book on which it was issued, so that each of the detachments may be verified when the agent's report is received in the audit office. Just so much more complication is added to these transactions when a passenger presents two or more partially used scrip books, from which he desires to have detachments made for the passage ticket, or where part scrip and part cash are tendered.

All of the foregoing is not necessary in the handling of the present form of scrip, except as to making the detachments, as no reduction is afforded from the full tariff rates, regular forms of tickets are used, and the scrip detachments in the aggregate are treated in the agent's account the same as cash.

The impracticability of using the regular forms of tickets to be issued in exchange for reduced rate scrip should be readily apparent from the illustrations that are given, as, for instance, this would at once have the effect of disorganizing the consecutive numbers of

the card tickets that are now sold for cash at a uniform rate, 206 and so reported, while the ticket issued in lieu of scrip would

be sold at a lesser rate; furthermore, provision must be made for the reporting of the scrip detachments in connection with each ticket issued, many of which are covered by both scrip and cash, and as a protective feature the conditions of a scrip exchange passage ticket must contain the provision that it would not be accepted unless presented with scrip book to correspond with the number that has been placed on the passage ticket by the agent, and must also have space for signature of passenger to be taken on train.

In connection with the sale of a reduced rate scrip book, which obviously must be nontransferable and bear some protective features, it is pointed out that this would consume a great deal more time than the sale of the ordinary transferable scrip book that is now in effect.

The foregoing explains the additional work of a ticket seller and in accounting for the sales to the audit office, to which there would be added much accounting work for traveling auditors in checking agencies, and for the agents in keeping record of the special forms of scrip exchange passage tickets that would be necessary for this purpose.

Experience has proven that where a reduced rate form of scrip or mileage book is in use the additional work imposed on ticket agents has made it necessary for the carriers to increase their selling and accounting forces at many depot and city ticket offices. Allowing that additional help would be required at, say, 300 agencies throughout the country, and there would be an average of two clerks, 207 say, at \$150.00 per month, or \$3,600.00 per year, this expense would run up to \$1,080,000.00. Great as is this additional expense, the proper operation of trains will not justify the general acceptance of mileage or scrip by conductors.

The foregoing is predicated on the plan of having the scrip exchanged at ticket offices and honored on trains only out of non-agency stations and where ticket offices are closed. The same security is not afforded under an arrangement which permits of practically unrestricted use of scrip on trains, in which case the burden of the work falls upon the conductor.

When honoring passage tickets issued in lieu of reduced rate scrip on trains it is necessary in order to carry out the protective features for the conductors to require the passenger to affix his signature in space provided on such scrip exchange passage ticket and compare same with passenger's signature in the scrip book, and also see that the number of the exchange ticket corresponds with the number of the book and satisfy himself that the scrip ticket and the book are in the hands of the rightful owner.

When scrip books are presented for transportation on trains conductor is required to make detachment, take passenger's signature on the back thereof, compare with the signature in the book, and endorse the detachment to show the stations "from" and "to," train number, and date honored. This applies locally within conductor's run. In order that the accounting may be properly conducted, the scrip detachments lifted by conductors can not be treated the same as ordinary cash fares but must be reported separately, item for item, so that the reduction from full tariff rate may be dealt with in computing the revenue in the audit office. Travel on standard fare tickets simply involves the collection of a large number of card tickets, under which arrangements no less than five passengers are very often handled in the course of a minute, while on the other hand it would often consume two or three minutes for the handling of a single passenger transported on scrip locally. Furthermore, conductors are not equipped with facilities for the proper protection of their scrip collections against loss or theft, nor could they be held responsible for loss in the same way that a bonded agent could be.

When presented on trains there are many small detachments of scrip which, combined with the flimsy texture of the paper, makes it almost impossible to guard against loss. In event that foreign lines' scrip is lost by the honoring carrier, this is precisely the same as losing so much money, as the only possible way for the honoring carrier to realize on such scrip is to present it to the issuing carrier for settlement. This is not the same in the case of a lost coupon for a foreign road's interline ticket, as these are settled for currently based on the sales and the coupons are retained in the collections of the honoring carrier.

It is a well-recognized fact that the handling of reduced-rate scrip or mileage detachments by conductors has the effect of slowing up the collection of transportation to such an extent that carriers in various parts of the country found it necessary in the past to put on an additional conductor or collector on some trains in order to protect themselves against loss of revenue due to the inability of one conductor to make all collections and properly attend to the safe operation of the train. In this connection attention is also directed to the complaints of conductors on account of being burdened with the rendering of mileage or scrip reports, with claims for overtime due to the fact that this extra duty imposed upon them makes it necessary for them to put in a great deal of time for this purpose after completing their runs. This was under conditions that were far less exacting than a nation-wide reduced rate mileage or scrip ticket would produce if made good for general use on trains.

As explained above, card tickets represent approximately ninety per cent of the total number of tickets sold, those for a given destination being included in the agent's monthly report as a single item and the accounting is quite simple. The commencing number is

checked against the closing number of the previous month, the subtraction is made from the closing number of the current month to determine the total number of tickets sold, with one extension of the rate to prove the correctness of the amount. Later, at the convenience of the audit office, the tickets that have been assorted in station order in the meantime are examined to see that there are no numbers in the collections other than those reported by the agent to detect any out-of-order sales.

Scrip exchange passage tickets must be checked at once in order to separate the scrip detachments of other roads' issues, which must be billed for. This means that it is necessary to verify the correctness of each scrip detachment, also balance cash, if any, in connection with each single item as reported. The same thing applies to the daily trip reports received from conductors. After the scrip detachments have been checked and separated from the stubs of tickets as issued by agents and conductors, the detachments are assorted as to issuing roads and those issued by the honoring carrier are filed in envelopes under the consecutive number of the book to guard against the possible misuse of scrip or the use of fraudulent scrip books, as well as for the purpose of investigating claims for overdetachments or otherwise.

The scrip of other companies' issues is listed on statement in detail, showing the opening and closing number of each detachment in order to compute the value of the total scrip of a given line's issue honored during the month, such statement being forwarded to the issuing line and settled for through the medium of interline ticket reports. In order to complete the accounting it naturally follows that the receiving carrier must check these detachments against the statement to insure against making an overpayment due to possible error in the statement. Such statements which are exchanged monthly between the many carriers handling mileage and scrip would be enormously increased, aggregating hundreds of thousands of sheets and involving millions of entries. After the detachments are checked by the receiving carrier they are filed with others of their own issue honored on their own line.

In the case of interline exchange passage tickets it is necessary for the carriers to make a separate apportionment of the revenue on this account, and in consequence maintain a separate set of division slips by reason of the fact that the fares between given points are correspondingly reduced from the normal fares, for which the carriers regularly have a set of division slips. Much added confusion results from part scrip and part cash are collected for the exchange passage ticket, as when this takes place the net fare varies according to the number of scrip coupons and the amount of cash collected for each transaction covering exchange passage tickets between the same points.

Incidentally it might be mentioned that the total apportionment on account of the scrip is charged to an account ordinarily entitled

"Scrip outstanding," in which the sales of the scrip books by the initial carrier have been set up in suspense from the agent's monthly reports, which applies in like manner to the values of scrip honored for local trips by agents and conductors in compiling the revenue figures.

The audit office would be obliged to take over the extra work in conducting their ticket stock records, due to the additional forms of scrip exchange passage tickets with which the agents would be supplied, also the conductors' scrip exchange train checks, and it is estimated that there would be an increase of expense to the extent of fifteen or twenty per cent on this account, exclusive of the work in the passenger department in handling requisitions, invoicing tickets, etc.

212 The redemption of partially used scrip books, partially used scrip exchange passage tickets, and claims for overdetachments that are handled in the audit office, or with some carriers through the general passenger department, would place such additional work upon the carriers, to which might be added adjustments of over and under charges developed in the checking of agents' and conductors' reports and correspondence incident thereto.

If it should be held that in the redemption of a partially used scrip book, honoring carriers who performed service on the various detachments found in the collections are entitled to a proportion of the difference between the value of the transportation furnished at the scrip rate and value of such transportation at the normal fares, there would be endless confusion in audit offices of the selling carrier making such adjustments.

Assuming for this purpose only fifteen per cent of the traffic would be handled on a reduced rate form of scrip book, it is estimated, based on past experience, current performance statistics, and increased number of operations in placing check on scrip or mileage detachments, that a carrier now having, say, \$25,000,000 of passenger revenue per year would require the services of at least ten additional clerks in the accounting department. On this basis it would mean that the carriers throughout the country would be obliged to engage approximately five hundred additional clerks, which, if extended at an average salary of \$1,200.00 per annum, would bring the total increased expense to \$600,000, which would be substantially the same regardless of whether the scrip generally were honored for transportation on trains or exchanged at the ticket offices. These figures are considered very conservative.

213 Detachments from scrip books actually in use are sometimes little pieces just an inch, and other pieces very much longer. A small detachment might possibly represent an interline account.

We would have to adopt some method by which we would send our statement and the lifted scrip to the road which issued it, and in doing that we would have to incur expense to get it there. If it

were a small package we could put postage on it, of course, but that would not be possible with a large package. I would say that the larger packages would be sent by express for safety purposes. That would increase the cost.

I believe less than one per cent of the total passenger revenue is from use of the present scrip coupon ticket. During the period when mileage books at reduced rates were issued, the revenue from them, I think, was about 20 per cent of the total passenger revenue. In the southeastern territory there was a two-cent book and a two-and-a-half-cent book. Interchangeable mileage books were issued in the past because of pressure—that is, demand for them; people wanted them. The roads hoped to derive more revenue if these books were issued, but they did not derive as much revenue as they would have if it had been at full rates. I believe the sale of these mileage books at reduced rates did not stimulate traffic, but there are no data on that question.

I do not know from statistics whether there was more travel as a result of these reduced rates, so that, of course, I would not be prepared to say now if there were a reduced rate that traffic might be stimulated.

214 My idea is that if a mileage or scrip book is issued it will shift travel from the straight fare to the reduced fare. If they are made nontransferable, with all the safeguards that I have in mind, and issued at a reduced rate, I do not think that more people would use them than travel at present. The person that would travel on a straight ticket possibly would travel on one of these tickets. The tremendous overhead and clerical expense that I spoke of would result from the necessity of auditing travel on these tickets. A substantial percentage of the traveling public might buy these tickets. I estimate that about 15 per cent of the total traffic would be on mileage. I do not think it would stimulate additional traffic.

The reason why excursion tickets are issued is because they invite new business. I do not believe that the issuance of these scrip coupon books or interchangeable mileage books at reduced rates would have the same effect. Through tickets from New York to the coast, for example, at a reduced rate, are issued in order to encourage business; that is, to encourage anybody who wants to use them, the traveling public generally. When I use the word "business" I do not mean the merchant or the commercial traveler only; I mean the traveling public generally. The through ticket from Chicago to the coast and return, at a reduced rate, is issued to encourage traffic, not traveling salesmen only but of the general public.

Adjourned to Wednesday, Sept. 27, 1922, at 10 o'clock a. m.

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HEARING ROOM, I. C. C. BUILDING,
Washington, D. C., Wednesday, September 27, 1922.

The hearing was resumed at 10 o'clock a. m. pursuant to adjournment.

Present: Commissioners Meyer, Esch, Lewis, and Cox.

Present also: Chief Examiner R. E. Quirk, Dr. M. O. Lorenz, director of statistics, and Mr. A. Wylie, director of accounts.

C. A. Fox resumed the stand and testified further:

Further cross-examination:

Any form of a scrip or mileage ticket has always been considered by the passenger traffic officials generally as unsatisfactory. The present forms are particularly undesirable because of the wider latitude in the taking of baggage than would ordinarily apply to a mileage ticket of a type that they would consider protective, which would require the exchange of coupons at the ticket office in advance for an exchange train ticket, so that the baggage would always be coincident with the movement of the passenger, which is not the case today.

We make no reduction in passenger fares to theatrical, Chautauqua, and other similar traffic. We have no special rate for a trainload of passengers. There are no party rates. Party fares were eliminated during the period of Federal control and have not been reinstated.

We are not now giving special passenger rates to theatrical companies. They get certain privileges under our baggage tariffs
216 as to the movement of their paraphernalia. This privilege is confined to the particular class of travel described in the tariffs. It would include also Chautauquas and convention entertainments. They get certain baggage privileges, but no reductions in their fares.

Our conclusion that any form of reduced mileage scrip ticket will result in a substantial reduction in passenger revenue is predicated upon the thought that we do not believe that it would stimulate travel to the extent of creating more revenue to the roads.

We have never compiled any statistics showing the number of passenger-miles carried during the period that mileage books were in vogue in many of the States and Territories. There have been no statistics of that character compiled in a detailed form as a consolidated compilation. We have the individual experience of the carriers operating in certain sections of the country, showing in times past the percentage of travel handled on mileage tickets compared with the total one-way business ranged from 18 to 20 per cent in New England territory as a whole; trunk-line territory, 20 per cent; southeastern territory, about the same per cent. That is testimony that has been given to me by passenger traffic officials as a result of their past experiences, and does seem to afford a very sound foundation upon which to reach deductions as to what would

happen in case a nation-wide interchangeable mileage ticket
 217 was introduced, good all over the country. Data is not available that would directly show either an increase or a decrease in the passenger revenue created by the use of these mileage books.

Not even in the case of the interchangeable mileage books previously issued by the railroads, according to our best information, was the purpose to stimulate travel or to secure additional revenue.

It is represented that the public are being deprived of a privilege they are properly entitled to, one that was extensively accorded voluntarily by the carriers over a long period of years; that in fact this has so become the accepted practice that it was a privilege which the railroads were not warranted in discontinuing. To deal in justice with this contention it is necessary to give the history of the mileage book from the early days of its use, beginning about 1868.

The mileage ticket was initially used largely, if not entirely, by the freight departments as a convenience or concession to shippers at a time when such favors were not in violation of law.
 218 These books were sometimes given to shippers free, or sold for amounts ranging from \$5 to \$20 per book for a book of 1,000 coupons. It was the custom also in those old days for the railroads to issue annual passes to the larger shippers. These larger shippers employed in some instances traveling men, although the number of such travelers was very limited, indeed, compared with to-day. It was not the desire of the railroads that such annual passes should be used by other than the principal of the firm to which it was issued, and the mileage ticket served to take care of the traveling men of these larger shippers. The mileage ticket also enabled the carriers to extend shippers favors measurable to their freight shipments, which was not the case with annual passes where record was not kept of the trips. There was at that time considerable discontent on the part of the passenger officials, because in the early history of mileage books passenger service was performed on those books for the benefit of the freight departments, passenger revenue received for mileage tickets not being credited to the passenger accounts. In time, however, this injustice was recognized, and at least on some roads proper credit was given the passenger accounts from the freight revenues on mileage tickets furnished.

While in the early days an occasional mileage ticket was sold by the passenger department for strictly passenger use, that seemingly was the exception rather than the rule.

The mileage ticket also became a common form of compensation for advertising and continued as such until declared illegal as an interstate proposition.

In time also the mileage tickets were more generally and extensively adapted by the passenger departments to their own uses. It is desired, however, to stress the point that the mileage ticket was not at the outset an expedient for the passenger departments' own

uses, and that even at the beginning it was a form of ticket
 219 not looked upon with favor by the passenger departments. The
 use of mileage tickets having become so prevalent with the
 traveling representatives of big shippers during this period as a
 freight concession at a time when such practices were not inad-
 missible, there was no escape upon the part of the passenger depart-
 ments from according the same kind of ticket to other shippers and
 commercial travelers if they were willing to pay the rates regularly
 fixed therefor at that time. This form of transportation, therefore,
 was in reality a legacy to the passenger departments, as an instru-
 ment for passenger transportation, for which they were hardly
 accountable, and it can be realized that the same desires that existed
 on the part of the commercial travelers for a preferential form of
 transportation and the same demands and influences that are still
 encountered are measurably responsible for the origin and con-
 tinuation of mileage tickets, and that it would have been difficult, if
 not impossible, for the railroads to have discontinued them.

Upon the enactment of the interstate commerce law in 1887, how-
 ever, when it became illegal for the carriers and shippers to use
 mileage tickets in the manner described, it being required that a
 uniform rate therefor be charged, if issued, serious consideration
 was given by the executive officers of lines covering a considerable
 mileage in the United States to the discontinuance of mileage tickets,
 and resolutions were so introduced.

This indicates that even back in those days the carriers had no
 relish for the mileage book and desired to get rid of it. But it was
 apparently as difficult to allay the demand for preferential rates
 for travelers as it is to-day. In any event, the tickets were con-
 tinued on sale throughout the country and in various denominations.
 They were utilized so extensively, and the railroads suffered such
 losses in revenue from the manner in which they were scalped by
 professional ticket brokers, hotel porters, omnibus drivers,
 220 and a myriad of other manipulators, that the condition
 became practically unbearable.

About the year 1892 or 1893, to rectify these difficulties, a bureau
 was formed in Chicago through which all the refunds on the covers
 of such books in a given territory were made payable through that
 bureau, after signatures had been examined on mileage strips sent to
 the bureau to confirm the use of the books by the original purchasers.
 Notices were served upon the ticket scalpers, whose stock in trade
 consisted very largely of mileage tickets, that they should turn in
 their stocks of mileage books and receive the value thereof, or suffer
 the consequences of the possibility of the loss of the rebates.

These facts are given to show that in those early years efforts were
 being made by the passenger department to minimize the ill effects
 and leakage inseparable from mileage tickets.

In 1896 the carriers in what is known as Central Passenger As-
 sociation territory also took the situation in hand, and, upon the pe-

tion of the commercial travelers, issued a 5,000-mile photographic ticket, sold at a flat rate of \$100, or 2 cents a mile, good over substantially all carriers in that territory, at a time when the passenger fare was normally 3 cents per mile. The ticket, however, was not popular with the commercial travelers, although it conformed with their petition at that time. The average sales per month were not much in excess of twenty books, which is largely accounted for by the fact that the individual forms of the carriers were also continued in use, sold at a rate of \$20, some of which were good over several connecting carriers.

As a result of the desires and influences of the commercial travelers, and also as a protective measure against the manipulation of the individual ticket previously described, a 1,000-mile book, interchangeable over all lines in that territory, was placed on sale. When introduced this book was sold at \$30, \$10 of which was refunded on surrender of the cover, if the signatures in the bureau's possession indicated exclusive use by the purchaser.

In 1906 or 1907, when the States commenced to pass the 2-cent fare laws, the Central Passenger Association books were restricted in use to interstate passage, no deduction in fare being made to holders of mileage tickets traveling intrastate. The amount the purchaser was required to pay at the time of the purchase as refundable on the cover was reduced to \$5, and ultimately to \$2.50. It is also true that the cost of the mileage in the 1,000 ticket had been increased from 2 to 2½ cents per mile. By the time the carriers were taken under Federal control in January, 1918, the use of the book had become so circumscribed because of being confined to interstate passage, and the fact that the rate per mile had been increased to two and a quarter cents a mile, when the interstate fare generally in that territory was about 2½ cents per mile, that the sales of the book had practically fallen off to nothing.

On October 20, 1917, a petition was filed with the Interstate Commerce Commission on behalf of the southeastern carriers requesting authority to discontinue the 2,000-mile form book and place on sale an individual mileage book containing 2,000 coupons (instead of 1,000) to be sold at 2½ cents per coupon, or \$45. That petition contained a comprehensive statement of the interchangeable mileage book situation as it then and previously existed in the southeastern territory, as well as in the territories of other associations, and cited illustrations showing the great percentage of the total traffic between numerous important points which was being handled on mileage.

The Interstate Commerce Commission held a formal hearing in December, 1917, upon this petition, and on February 4, 1918, issued Fifteenth Section Order No. 320 declining the request in so far as it related to the substitution of a 2,000-mile individual
222 book in lieu of the 1,000-mile individual book. Authority was granted to increase the rate on the 1,000-mile book from 2 cents per coupon to 2½ cents per coupon, and authority was granted

for the discontinuance of the interchangeable 2,000-mile form ticket, which particular form of ticket was withdrawn effective June 9, 1918.

Before issuing tariffs in accordance with this order of the Interstate Commerce Commission, it was deemed advisable to secure corresponding authority from the commissions in the several South-eastern States. Before the completion of this procedure, however, the United States Railroad Administration ordered the cancellation of all mileage books sold at a reduced rate, and on June 10, 1918, interchangeable individual mileage books of the denomination of 1,000 coupons were placed on sale in the Southeast at \$30 per book, or 3 cents per coupon.

Mileage experiences somewhat along the lines of those described occurred in different regions throughout the country, all of which is related to show that the tendency, effort, and desire of the carriers was to restrict, so far as they considered it practicable to do so, the use of these books, because it has been the experience from the beginning that they are an unbusinesslike, unjust, and expensive form of ticket to handle and account for, and that there are revenue losses occurring in connection therewith which are not experienced in the use of one-way tickets.

When the carriers were placed under the supervision of the Government in January, 1918, all forms of mileage tickets were discontinued. It must be assumed that those responsible for the affairs of the railroads in the hands of the Government thoroughly went into the merits of this question before taking this action, and that the Railroad Administration was unwilling during the period it was responsible for the revenues of the carriers to be responsible for the

continuation, even for a short period, of a form of ticket having such a record as the one described above. Scrip coupon books of \$15, \$30, and \$90 denominations were then placed on sale, affording no reduction from the normal fare. It is understood they were intended largely to relieve the congestion which was occurring in some of the larger city and depot offices throughout the United States during the abnormal war activities and also to afford the commercial travelers the additional convenience and advantage of boarding trains for short and frequent jumps in covering their territory, where it would be possible for them to utilize the book to the extent of the tariffs held by conductors.

As a summary of the foregoing, the point is made that a practice and a custom that was practically foisted upon the passenger departments of the carriers throughout the country, and which it has been impossible for them to escape except through the wisdom of the United States Railroad Administration as above explained, should not constitute a practice of a character which the carriers believe warrants continuance of the mileage tickets, because of the methods of the past.

I have no direct information or figures to show whether or not loss of revenue resulted from the issuance of mileage books at re-

duced rates. It would be practically impossible to compile data of that character. I would not know how to go about it.

What I said meant that the Government discontinued the use of mileage books because it recognized the discrimination and irregular manipulation of mileage tickets. I think that was more likely the reason than the desire to curtail travel. However, I do not and could not know what the reason of the director general was.

224 I do not believe that the use of a photograph on a scrip ticket would entirely obviate the danger of scalping. If the photograph were accompanied by the provision that the ticket should first be presented at the ticket office for an exchange ticket, that would minimize it to a considerable extent. If there was a further provision incorporated in the ticket including the penalty clause of the new law, that would give the carriers a reasonable degree of protection. I think it would be highly important that the provision be incorporated requiring the holder to exchange the scrip for an exchange ticket. If all of these provisions were adopted I would consider a photographic form of ticket interchangeable for coupons at stations before the passenger boards the train reasonably protective.

The commercial travelers in their conferences with the railroads in 1920 and in the hearings before the Senate and House committees contended that the business stagnation then existing was, in a measure, due to the high passenger fares which prevented the mercantile interests from sending their men out on the road. As an evidence that this was not the fact, and as explaining some of the true causes for the falling off in the total volume of passenger traffic, particularly short-haul traffic, during the year 1922, the following facts are presented:

It is first pointed out that the carriers share, with other industries, the effect of general business conditions, whether they are favorable or unfavorable. More specifically, however, the most direct cause for the falling off in passenger traffic has been due to the new and growing competition of hundreds of bus lines which have been built up in every State of the Union, and the millions of privately owned automobiles.

225 I have here a map recently prepared displaying the extent of automobile bus lines in the States of Ohio, Indiana, and Michigan (Lower Peninsula) which is reasonably typical of all sections of the country. To a very considerable extent in those States where there is a railroad between two points of any consequence there will be found an improved highway either paralleling it or projected, and these highways are as a rule used as fast as built by motor-bus lines. These highways are to a very large extent built and maintained by taxes or by bond issues, and the largest contributors to their cost and maintenance are the railroads. The busses use these highways with flexible equipment and operate more frequent schedules than the carriers, pick up business along the

highways, depriving the carriers of a very large percentage of their local business.

The fares of the bus lines are in some cases lower and in other cases they are the same or higher than the rail fares, but regardless thereof they are a controlling factor in handling this short-haul traffic for the reason they pick up and deliver passengers, taking them from the main streets of the originating points to the main streets at destinations, and the service is so frequent that it diverts traffic from the rail carriers.

Millions of individually owned motor cars also make inroads on the local and through traffic of the carriers, which has been lost for all time.

Instead of any prospective alleviation of these difficulties, the losses will undoubtedly from these causes continue to grow because of the vast amount of money being expended in every State of the Union in the improvement of the public roads.

For these reasons it is not believed a reduction in fare by means of reduced-rate mileage or scrip ticket would have the effect of
 226 restoring to the rail carriers any considerable volume of this traffic now handled either by bus lines or in privately owned automobiles.

This situation has been gradually growing with the development of the new roads. It started with the development of the roads and the growth of the bus lines. It is one of the greatest underlying reasons for the decline in passenger traffic.

I reconcile this statement with the sudden increase in traffic up to 1920 and the decline after 1920, on the basis that it represents the period following the war-time period, when we had a continuation of abnormal commercial activities, when the passenger revenues of the carriers were in a measure comparable to the commercial prosperity of the country. There was a further important factor in that the troops were being returned, and in very large numbers. These factors contributed to a very large extent to the passenger revenues at that time. The automobiles and bus lines had an effect, but it was not so apparent as it is now. It was a period of high commercial prosperity that continued after the war-time period for quite a while; also there were two million troops that were being brought back at the time, which contributed very largely to augment the revenues of the passenger carriers.

The merchants were trying to stimulate business. They were very largely stocked; they had to get rid of dead goods. The railroads have no dead goods; they are selling only one commodity, which they cannot afford to sell at a loss.

During the time when interchangeable mileage books were issued the reporting and accounting thereon was just as complicated
 227 and burdensome as I have explained here except confined territorially. The figure of about \$1,680,000 I gave as additional cost was stated with the idea that it would be explained in detail

by the accounting witness who was familiar with those expenses. I have no data as to what the cost was in the past.

I have no data to show whether or not the issuance of interchangeable mileage books in the past was profitable to the carriers. We have no facts and figures to show whether a loss of revenue would result now from the issuance and use of interchangeable scrip books at a reduced rate. What I have said on that point is individual opinion, the best judgment—that is, the consensus of views of the passenger traffic officials and myself.

I think the transportation charge is not the governing factor which keeps people from travelling on account of travelling expense. The hotel rates and other expenses are so much greater, in which there have been no reductions such as you have in mind, that the difference in the rate would not be the controlling item. It would be one of the items but it would not contribute very largely compared with the matter of hotel expenses and other expenses at destination.

At this moment I am unable to make any suggestion that would make it possible for the commission to draw an inference either way as to the effect the use of mileage books has had upon the revenue of the carriers using them. I do not at present know of any data.

Redirect examination:

My forecast that the reduced scrip ticket would not stimulate travel or bring the railroads additional revenue was made in the light of the facts included in my previous testimony as to the

228 prior experiences of reductions; also the experiences of last January, when there was an 8 per cent reduction by the removal of the transportation tax; also the fact that when mileage tickets were previously used they represented approximately 20 per cent of the travel in certain considerable regions, sections of the country which would reasonably be typical of the whole. When I said there were no facts underlying this forecast I merely meant that we had no statistical data as to the effect of the inauguration of any particular mileage ticket on any particular line which enabled us to show from that experience that we suffered a loss in revenue.

In the statement which I have already made referring to these instances where there have been reductions I have not omitted any instances that in any way bore upon the subject. I have withheld nothing of that character which was available. What I have given was prepared at other times in connection with other matters that happened to be brought to our attention as possibly of value here. There was no special selection or preparation of this particular information.

Mr. BIKLE (representing carriers). If these applications for exemption could be treated as an appendix and independent of the formal record as to the primary issue, I should be very glad.

(NOTE.—It was agreed by all parties that all the applications for exemption, over 400 of them, which had been filed with the com-

mission, were unrelated to the lines of evidence suggested in the commission's notice of hearing (as stated in the commission's report, 77 I. C. C. 200, 201), should not be part of the docket in 14,104 proper, but dealt with in a subnumber, should be filed as an appendix to the proceeding and regarded as part of this record, that it would

not be necessary to call witnesses for each of the applicant carriers, that the statements of these carriers furnished yesterday would be received in lieu of testimony offered by witnesses, and that the evidence offered by the trunk lines be considered on the exemptions as far as appropriate, particularly as to truck or automobile competition, and the accounting costs and other costs.)

230 WILLIAM P. ROSE resumed the witness stand and testified further:

Cross-examination:

With reference to the time when mileage books were sold at reduced rates, I can tell you how much of the total passenger revenue was derived from their use, but I cannot tell whether or not their issuance and use increased or decreased the total passenger revenue.

When I estimated yesterday that the amount of transportation which would be carried on mileage or scrip books would be not less than 15 per cent, my estimate was based upon actual experience when the mileage books were previously in use. In some territory I believe it was found that it was 20 per cent, some 18, and some less, but to be very conservative we estimated that if the transportation on mileage should be 15 per cent of the whole then these certain things would happen.

During the year 1917 the total passenger revenue of the Southern Railway Company was \$24,303,182, of which \$3,460,894, or about 15 per cent, was derived from traffic using interchangeable mileage or scrip books at reduced rates. It took 28 clerks to handle the records on this \$3,460,894 and 175 clerks to handle the rest of the records on the total of \$24,303,182. If there had been no mileage or scrip books the 175 clerks could have handled all the records. If interchangeable scrip coupons tickets were issued now I believe more than 15 per cent of the total passenger revenue would be derived from them, because, being good over the entire country, they would be used more than the 1917 books, which had territorial limitation.

231 When the ticket was exchanged at the window, as it was at that time, except where the station was not open, or nonagency, the agent issued a train exchange ticket or passage ticket. Now, at the end of the month the agent made up a report, in which he listed all those things, item by item, and when that report was completed it was turned into the audit office with the stubs of the tickets he had issued, to which were pinned these mileage detachments. When they got into the office the first thing they did was to try to lock it up in fireproof safe, because if you didn't do it there

might come a fire overnight and destroy a lot of revenue. The first thing to do was to lock it up.

Then, as we had an opportunity, we had to check these out, item by item, count the mileage, and in many cases where they were cash, there was not sufficient mileage to take the man to his destination and they had to collect the difference in cash. There was a column on the report that showed the cash as well as the scrip. They had to be checked out, item for item, and verified. If there were any errors, of course, the matter had to be adjusted with the agent.

After that was done we had to segregate from the amount of mileage that which was issued by the foreign lines. Then that had to be listed on statements, item for item, showing the commencing number and the closing number of each detachment, the sum of all the commencing numbers and the sum of all the closing numbers, recapped, and one deducted from the other gave the value of that mileage listed. That had to be put up in a package and sent either by express or registered mail to the other carrier. We received in return a like statement. We had to check that up, check the detachments with the report, and if it was all right we entered it to his credit, and he drew for it with a draft.

232 The mileage books formerly issued by the Southern Railway were redeemable, but there was a certain number that was never presented for redemption. A man would carry around in his pocket a book with just a few coupons in it. He would not think it was worth while to redeem it. A great many people would lose the books, and in that way there was quite a little bit of mileage that was never redeemed. I haven't exact figures, but my recollection is that the road derived possibly \$5,000 or \$6,000 a year on unused and unredeemed mileage. I do not know how this would compare with other roads.

233 DAVID H. CLINK, a witness called by National Council of Traveling Salesmen's Associations, testified:

I am secretary and treasurer of the International Federation of Commercial Traveler's Organizations and chairman of its railroad committee. I appear here on its behalf and on behalf of the numerous organizations throughout the United States affiliated with it. Also on behalf of numerous manufacturing and jobbing interests and associations which I have named. The affiliated membership of the federated bodies is 676,000 members.

In view of the 33½ per cent discount voluntarily granted by the carriers in the sale of mileage books, interchangeable and otherwise prior to their discontinuance, we can only judge that to have been a just and reasonable rate. And considering the rates now in effect governing the sale of of tourists, summer and winter resort tickets, a discount of 33½ per cent from prevailing passenger tariffs would appear just and reasonable.

We recommend a scrip coupon ticket of \$100 denomination gross. Considering the fact that the average commercial traveler spends nine months of the year on the road, as against one day of the year on the part of the ordinary citizen, if you please, it would seem just

and reasonable to grant the traveling salesmen the concession prayed for. The proposed discount would only apply to the proposed denomination of tickets, thus protecting the local revenues of the carriers; and while the larger denominations are open to the public, discrimination is avoided. The more of such tickets sold the greater the source of revenue to the carriers, involving a larger investment of money in advance for transportation requiring on an average of four months to consume.

We earnestly urge a nontransferable ticket for this reason, believing as we do that commercial travelers are by virtue of their calling compulsory patrons and revenue producers in passenger traffic, and in fact equal freight solicitors for every line of road over which they travel, and in consequence entitled to a consideration not accorded the ordinary passenger unless participating in the purchase of the same denomination of scrip coupon tickets.

In summing up the situation, business, which includes the carriers, requires a stimulant, and the carriers, no doubt appreciative of that fact, brought home to them from a sadly diminished revenue in their passenger department, sought to apply the remedy by a radical reduction in passenger rates to far-off distant points, summer and winter resorts, and no doubt had the desired effect to a limited extent. They seemed to forget that the commercial traveler had been able up to the beginning of the World War to purchase mileage books interchangeable and otherwise at reduced rates. They appear to have overlooked or ignored the fact that excessive rates exacted were driving thousands of commercial travelers, particularly those selling on commission, into idleness, the employers of those on a fixed salary reduced to the lowest minimum their selling forces, and many employers have supplied their traveling men with automobiles in an effort to escape excessive railroad fare as a matter of economy.

A reduction in rates would reemploy thousands now idle and add additional thousands to the ranks of the traveling fraternity. The commercial traveler and employers ask for no special privileges, nor do they expect something for nothing. They do expect and should receive consideration commensurate with their enormous patronage.

Cross-examination:

235 The reductions made by the railroads to California points and on summer and winter resort tickets were some of them as low as 50%. The mileage tickets I speak of were generally interchangeable. We did have them confined to the Western Passenger Association and the Central, but eventually they were good on either one.

The Pennsylvania Railroad mileage ticket prior to Federal control was under a reduction of only 10 per cent. That is an isolated case.

I could not give you the number of commercial travelers of the 600,000 whom I represent who are idle at the present time. I could

only estimate from general correspondence. I think this mileage book would be very generally used. I think the estimates of 15 or 20 per cent given by previous witnesses are low. I think it would be easily 25 per cent, and it might be higher than that. I haven't figured what a 33 $\frac{1}{3}$ per cent reduction would mean on 25 per cent of the railroad's passenger revenue.

JOHN F. SHEA testified:

I reside in San Francisco, California. I appear on behalf of the American Hotel Association. I have been in the hotel service for the past 22 years and have been connected with hotels in Texas, Kansas, Colorado, New Mexico, Arizona, and California. I am secretary of the Northern California Hotel Association and of the San Francisco section of that association and a member of the executive committee of each, member of board of control of California State Hotel Association, secretary and a director of Western States Scenic Association, member of executive council of American Hotel Association and chairman of its travel bureau committee.

I am of the firm opinion, as also are my associates, that any
236 reduction in passenger rates, either by the use of an interchangeable scrip book or tickets, of any kind, immediately develops business, and there is a constant and immediate reaction felt in the hotels of the United States.

The hotels of the United States are particularly situated in that manner, that the slightest imposition put on travel, or the loosening up of travel, immediately is felt by them.

Within the last three months I bought a summer tourist round-trip ticket from San Francisco, California, via Chicago and Boston, to Halifax, and return via Montreal, Prince Rupert, and Seattle, to San Francisco, a total distance of 9,475, for \$195.04, or at the rate of 2.05 cents a mile. Such tickets were on sale daily from May 25 to August 31, 1922, good for return trip until October 31, 1922. To attend this hearing I bought a 9-months' round trip ticket from San Francisco, Calif., via Chicago and New York, to Boston, and return via Chicago to San Francisco, a total distance of 7,454 miles, for \$209.12, or at a rate of 2.8 cents a mile. Such tickets are on sale every day in the year and good for return trip within 9 months of date of sale. At the same price I could have bought a ticket via New Orleans to Boston and return via Chicago and New Orleans, which would have figured only 2.4 cents a mile.

On behalf of the American Hotel Association I wish to enter vigorous protest against the six-months' feature and the \$200 denomination of the scrip book, as I am of the opinion, as are my associates, that such would not be a stimulant to travel.

Cross-examination:

There are many men not commercial men, men in small lines of business, and men like myself in business, who would like to
237 take advantage of a scrip ticket if it were available. Before the war, when it was available, I always had one.

The Hotel Association have a selfish interest in the development of travel. There is no question that tourist fares have operated to stimulate travel between the East and the West. We would not be able to exist without them.

In giving these illustrations of the trips I have taken, or might have taken, I came by the most advantageous way. There may have been shorter routes. The fare that I paid may have had to meet fares by shorter routes.

I have no idea what portion of traffic would move on reduced tickets if this reduction were granted, nor do I know how much revenue loss the carriers would sustain, nor have I any idea how many passengers would be diverted from the straight normal fare to this lower form of ticket. I am of opinion, however, that whatever is diverted would be made up by the increased number that would be bought. That opinion is absolutely without any preliminary idea as to those other factors. I realize that this ticket might be used for frequent short trips of relatively short distance.

The present depression in travel may be attributable in a way to the railroad fare, and to other causes, too. The other causes I suppose are the higher cost of living, different things that go to make things cost more, increased cost in all lines. I think there would be a stimulation of travel if only the railway fare were reduced, but I would not say that that is the controlling factor.

Adjourned to Thursday, September 28, 1922, at 10.30 o'clock a. m.

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HEARING ROOM, I. C. C. BUILDING,
Washington, D. C., Thursday, September 28, 1923.

The hearing was resumed at 10.30 o'clock a. m., pursuant to adjournment.

Present: Commissioners Meyer, Lewis, and Cox.

Present also: Chief Examiner R. E. Quirk, Dr. M. O. Lorenz, director of statistics, and Mr. A. Wylie, director of accounts.

AARON M. LOEB, a witness called by National Council of Traveling Salesmen's Associations, testified:

I am president of the National Council of Traveling Salesmen's Associations. The statements I shall make are the consensus of opinion and the conclusions resulting from many conferences with representatives of all of the recognized traveling salesmen's associations and organizations throughout the country.

We believe that in the issuance of interchangeable scrip coupon tickets a just and reasonable reduction from the standard fares would be $33\frac{1}{3}$ per cent. At this rate the books would become instantly popular, and they would effect a substantial increase in the amount of travel by the employment of additional salesmen or the reemployment of those who have been laid off by reason of the high cost of traveling. The railroads thus would be immediately benefited, for in addition to the millions of dollars that would be on deposit without interest covering unused mileage and which would

logically grow greater and greater as these books become more popular, they would also enjoy the increased passenger traffic as well as the resultant freight created by the many additional traveling salesmen who would be put on the road by the business houses of the country in response to this reduction.

The traveling salesman is one of the most important factors, if not the most important factor, in the distribution of the great
239 bulk of products of the Nation's industries. Upon his activity depends very largely the economical functioning of our manufacturing and mercantile interests, and it must be remembered that they in turn, through the stimulation of new business, will be in a position to give employment to vast numbers of workers throughout the country; and it must not be forgotten that one of the outstanding reasons why the railroads have been suffering a decrease in passenger-miles is the fact that a large percentage of the people of our country have been unable to enjoy the opportunity of ordinary travel both because of unemployment and because of the unreasonable, high cost of travel.

We know that the reduction mentioned would be an inducement to traveling salesmen on commission to-day who are reluctant to pioneer or venture into new territory or towns in which they have no established trade, because of the existing excessive railroad fares. Likewise those firms employing and advancing the expenses of traveling salesmen are to-day reluctant to open up new territory with new men because the attendant expense under the present standard fares entails too great a degree of risk in proportion to the likely return.

Speaking for myself in my capacity as sales manager of one of the country's representative clothing manufacturers and as a member of the executive committee of New York's Men's & Boys' Apparel Industries, Inc., supplemented by my general knowledge of conditions existing with and among other manufacturing concerns of other lines of industry, as a result of my broad contact as president of the National Council of Traveling Salesmen's Associations, I am confident that the direction by your commission of a 33½ per cent reduction on the interchangeable scrip-coupon books ordered by Congress would immediately stimulate all industries and must add materially to both the passenger and freight traffic of the railroads of the country.

240 I have not prepared an analysis of the cost of producing this transportation to show whether the rate of 2.4 would meet that cost.

Where there is a fixed number of representatives traveling per year they would make additional mileage by the fact that they would make additional towns, and with respect to those organizations which have reduced their traveling force they would increase to cover those other points.

Increase in a salesman's travel does not necessarily imply reaching beyond a point, but in many instances merely means picking up smaller towns in between the larger cities.

I will illustrate how the mileage traveled may be increased even without enlarging the general territory covered. We have practically to-day eliminated all towns under 5,000, because it does not pay us with the present excessive cost of travel to have our men make those smaller towns. Formerly we made everything of 2,500 and upward; in some instances as low as 1,500. Now those merchants in the smaller towns are deprived of the facility of making personal selection from samples shown them by traveling salesmen, which is a decided advantage for the smaller dealer in the small town, who otherwise is compelled to order from catalog or by the open-
241 order method, whereby he may get what he wants and he may not.

I recall that some years ago in the Southwestern Passenger Association there was sold a book; I think they charged the purchaser one dollar for this book, and when he had traveled an aggregate of 1,000 miles, if my recollection serves me, he turned those certificates in, which showed the points of origin, the destination, and the price of the ticket, and he received a refund on that 1,000 miles, which was sold at 3 cents a mile at that time in the southwestern passenger territory, of \$10, if my memory serves me correctly.

Now, that was in effect until by legislation some of the States in the southwestern territory made the fixed rate 2 cents per mile—for instance, in Arkansas, Oklahoma, and Kansas—and then the railroads withdrew that privilege.

The railroads had put that means of a rebate into effect voluntarily. It seemed to work to mutual satisfaction to all concerned.

That is one thing that caused me to think that the 33½ per cent reduction would be feasible at this time.

I do not think the general business depression was the primary or even a large contributing cause of the decrease in the amount of travel by salesmen. If railroad fares had not been excessive, the business houses and manufacturing concerns would have been
242 inclined to have pushed harder. They would have taken a chance by putting additional men on the road and going after business that much harder, because that is the policy of every rightly conducted business organization—as business becomes more depressed, to work harder to stimulate business.

The National Council of Traveling Salesmen's Associations caused to be prepared a questionnaire which was sent to various institutions in different industries, which questionnaire asked for the following information:

"First, the character of the merchandise dealt in by the firm.

"Second, the number of salesmen employed who traveled each year from 1917 to 1921.

"Third, the number of business trips each salesman made.

"Fourth, the number of weeks each salesman traveled.

"Fifth, the number of trunks each salesman carried.

"Sixth, if the answers to the foregoing questions indicated that road traveling of the firm's representatives had been diminished in 1920 and in 1921, to state the reasons for this reduction.

"Seventh, whether, if the mileage book were issued at a reduction of from 25 to 33½ per cent, what effect it would have in 1922 and thereafter upon the selling staff of the firm and the extent of its traveling."

The National Council of Traveling Salesmen's Associations
243 received a number of replies, which I directed to be prepared in summary form for submission to this commission so that such summary would give the answers to the foregoing questions. The résumé thus prepared shows the following:

Schwartz & Jafes, Inc., 880 Broadway, New York, manufacturer of boys' & young men's clothing: Traveled 45 salesmen in 1917; 32 salesmen in 1921. In 1917 they traveled seven weeks each trip. In 1921 five weeks each trip. Formerly carried four trunks; 1920, three trunks. Excessive railroad, Pullman, and excess-baggage rates rendered trips of many men unprofitable. Others were forced to concentrate on larger cities and towns, thus shortening their trips. Mr. A. M. Loeb, sales manager, states that the issuance of mileage books at reduced rates would result in an increase in the number of men traveling and longer trips.

Hirsch, Wickwire Co., Chicago, manufacturers of clothing, 337 South Franklin Street, Chicago: Traveled 18 men. Mr. Scheltes, secretary and treasurer, states that salesmen would make a greater number of towns under more favorable mileage rates.

Bernhard, Ulman Co., Inc., yarns and art needlework, 107 Grand Street, New York City: Mr. Uhrey, president, states that they traveled 24 men, and that under a more favorable rate, and especially in connection with an interchangeable mileage book, they would reduce their traveling expense and increase their road forces because the rates now are too excessive.

J. B. Pearce Co., wall paper and wall decoration, 1069 Superior Avenue NW., Cleveland, Ohio: Have reduced their sales force. Prior to 1921, 25 men to 21 men, and have been sending their road representatives out on one trip a year as against two trips previously.

Mr. W. H. Gustin, vice president, states that "because of
244 increased passenger rates we have decided to cut down the size of our line and reduce the number of salesmen." He adds that if Congress should authorize the issuance of a mileage book at 33½ per cent it would "greatly increase our sales force and add to the number of weeks our men will travel."

Tobacco Products Corporation, 1790 Broadway, New York: Mr. Louis Erdt, vice president, states that they travel 200 salesmen pretty much the year round, but that the present high cost of travel has reduced the extent of the trips because of the high cost. Under a moderated cost "we would undoubtedly increase and extend our sales force on the road."

Cohen & Lang, 707 Broadway, New York, manufacturers of young men's and boys' clothing: Mr. O. P. Kilbourn, sales manager, states that they traveled about 20 salesmen and indicates that the very large increase in the cost of travel has had a marked tendency to restrict the length of their semiannual trips, which means, of course, that the amount of mileage which they cover is materially reduced. There is absolutely no doubt in our minds that should a material reduction in the cost of travel be brought about through a special mileage book our sales force for 1922 would be able to cover more ground, more economically, and therefore increase our sales to a large extent.

Crown Corset Co., 295 Fifth Avenue, New York City, announce through Mr. Ralph E. Miller, vice president, that their sales force has been materially reduced and their number of weeks diminished annually to 24 weeks because of the excessive high cost of road travel, adding that they would travel all salesmen continually and make the smaller towns.

Portis Bros. Hat Company, 337 South Franklin Street, Chicago, Ill., manufacturers of hats and caps, advise through Mr. I. M. Portis, president, that under more favorable rates they would increase the extent of their travelers and also their business.

Morganite Brush Co. (Inc.), 519 West 38th Street, New York City: Mr. H. C. Mills, sales manager, states: "We have had to restrict the distances covered by our engineer representatives (salesmen) during 1921 on account of business depression and cost of traveling. If a reduction by mileage book could be effected we should probably still expend the same amount on traveling but cover greater distances. We should probably extend the field of each man and make his trips cover a wider area or alternatively increase our force."

J. H. & C. K. Eagle (Inc.), 265 Fourth Avenue, New York city, silk manufacturers: Mr. W. S. Fraser, sales manager, states: "We are very keenly interested in the securing of a general mileage book which would materially reduce the amount of money we are compelled to expend in traveling our force of approximately 20 salesmen. Naturally in times like the present, when all institutions are endeavoring to hold their overhead down, the lowering of railroad charges would have a tendency to have our salesmen cover their territories more extensively and more frequently than they are now doing. Another fact to be considered is that we would also feel more inclined to increase our selling staff of traveling salesmen if the selling cost could be reduced from the high point that it has now reached. Railroad fares and hotel charges have both been excessive, and anything that will tend in the direction of reducing them will undoubtedly have the effect as indicated above. We trust you may be successful in securing this much-needed mileage book."

B. Kuppenheimer & Co., 415 South Franklin Street, Chicago, Ill., manufacturers of men's clothing, traveled 35 salesmen. Mr. B. J. Cahn, sales manager, states that they diminished their travel in 1921

due to the heavy cost of traveling in small towns. "If Congress would issue a mileage book it would be of material assistance in enabling us to reenter country districts."

246 Straube Piano Co., Hammond, Ind., manufacturers of pianos: Mr. R. S. Dunn, central and northwestern representative, advises that their salesmen operate on commission without drawing account. With the present railroad rates the men will not attempt prospects where an order is not assured. "This leaves dealers all over the territory who could possibly be sold without a personal contact with our road men. When urged to make these calls the salesmen simply tell us that they can not afford to spend the money without assurance of an order. Regular established trade is visited, but the missionary work, without which no factory can exist, is not done. Under lower rates these men would feel justified in extending operations into new territory and would double the present amount of traveling, which has reduced itself to about 15 weeks a year."

Aurora Corset Co., Aurora, Ill., manufacturers of corsets, travel 20 salesmen 44 weeks each year. Advise through their representative, Mr. S. J. Mead, that they would increase their road force under more favorable traveling rates.

International Corset Co., North Avenue and Union Street, Aurora, Ill., corset manufacturers, advise through their sales manager that they traveled 20 salesmen, adding that the traveling by their representatives throughout 1921 was at a minimum because of the high rate of transportation. He states that lower rates would "aid us materially in keeping the salesmen busily engaged for a period of 40 weeks out of the year for road work."

Janeway & Carpender, New Brunswick, N. J., wall-paper manufacturers: Mr. L. B. Janeway, vice president, states that they have reduced their sales force from 42 to 38 men and would probably travel more under a diminished mileage rate.

Graupner, Love & Lamprecht, 230 Fifth Avenue, New York City:

Mr. John H. Love states that if a general reduction in the
247 form of mileage books were made "it would act as an incentive to increase the activities of our salesmen to a considerable extent."

The Kippendorf, Dittman Co., Cincinnati, Ohio, manufacturers of ladies' shoes, traveled 24 salesmen, states Mr. Wm. B. Schawe, treasurer. Thirty-three and one-third per cent reduction would be the cause of making increased trips, whereas now the salesmen are reluctant to make return trips particularly embodying some distance. It will be an inducement for a great many houses to increase their traveling force and to cover territories more minutely than they have been desirous of doing in the past years because of the excessive transportation charges. "In our opinion, what the railroads may lose by making this concession of 33 $\frac{1}{3}$ per cent rate on a mileage book for the traveling salesmen will more than be made up in the increased mileage of travel and in the increased number of salesmen that will be added to the traveling force."

Sunstar Manufacturing Co., Inc., 740 Broadway, manufacturers of pants: Mr. Harry Ruder, president, states that they travel 16 salesmen and they would put on more salesmen and their entire sales force would be on the road a greater length of time if the cost of passenger travel was reduced.

Knight-Campbell Music Co., Denver, Colo.: Mr. W. W. Bradford, treasurer, announces that their traveling force has been reduced from 15 men to 9 men. Excessive railway fares, hotel charges, and other expenses limit the possible volume of business, because of the reduction in traveling force and the extent of territory covered. Under a 33 $\frac{1}{3}$ per cent reduction in connection with an interchangeable mileage book, "we would immediately be able to put on several more men and would extend the radius of territory covered by us very materially."

Thos. G. Plant Co., Boston, Mass., manufacturers of women's footwear: Mr. Frank R. Maxwell, vice president, states that they travel 36 men, who would remain on the road longer under a reduced rate, and at the same time the latter would help to reduce the cost of shoes.

Morse & Rogers, Duane, Hudson & Reade Streets, New York City, manufacturers of shoes: Mr. Morse G. Dial advises that they travel 60 salesmen, and a reduction in mileage rates would increase their traveling at least 5 per cent.

Muser Bros., 1150 Broadway, New York City, laces and embroideries: Mr. Morris Muser, vice president, states that they have reduced their sales force from 28 men to 18, the increased traveling expense being responsible; adding that they would materially increase their road salesmen, as many territories are not paying to-day on account of the heavy expense.

Fownes Brothers & Co., 119 West 40th St., New York City, gloves: Mr. W. P. Fillin, sales manager, states that they travel 23 representatives, and under a reduced mileage rate they would travel more.

The Autopiano Co., 653 West 51st Street, New York City: Mr. Paul B. Klugh, president, advises that they have reduced their selling force of 13 road men to 8 men because of the high cost. The issuance of an interchangeable mileage book would increase travel.

E. C. Atkins & Co., 56 Reade Street, New York City, tool and saw manufacturers: Mr. E. M. Clark, manager, advises that they have disposed of 40 per cent of their traveling force on the road because of the high cost of travel. If the interchangeable mileage book were issued at a reasonable reduction, it would increase their traveling materially.

Geo. C. Batcheller & Co., 130 Fifth Avenue, New York City, manufacturers of corsets, through their sales manager, Mr. L. A. Setzler, advises that they travel 20 road representatives, adding "As our merchandise is sold by traveling salesmen direct to the retail merchants, a reduction in railroad fares would

enable us to visit hundreds of small towns which are not now being visited, owing to high rates."

Heystek & Canfield Co., Grand Rapids, Mich., wall paper and paints, advise their sales force dropped from 17 representatives to 12, and that under more favorable rates they would increase their sales staff on the road.

Bolway & Co., Syracuse, N. Y., phonographs: Mr. Frank E. Bolway, president, states that they traveled 20 representatives continuously during the year round for many years, but that during the past two years they have diminished their traveling to one-half the year, the cause for diminishing travel being high cost, adding that "present rates are destructive."

Rosenwald & Weil, 3815 Armitage Avenue, clothing specialties, travel 30 salesmen. Mr. Max J. Help, sales manager, states that if an interchangeable mileage book at a reduction of rates would be issued their salesmen would travel longer during the year 1922.

Ederheimer Stein Co., 1911 Roosevelt Road, high-grade young men's and children's clothing, travel 26 men. Mr. Isaac Fishell, vice president of this company, states that if a mileage book were issued that the salesmen would make longer trips.

M. H. Birge Sons Co., Buffalo, N. Y., wall-paper manufacturers, through Mr. Howerd M. Eaton, vice president, advise that their sales force has been greatly diminished and that they have reduced the number of weeks of travel from 37 weeks per annum to 17 weeks, excessive rates being responsible. Under more favorable rates they would feel inclined to make a more thorough canvass for business.

Curtis Lager Fixture Co., 235 Jackson Boulevard, Chicago, Ill., through Mr. D. J. Burke, sales manager, advise that their traveling would greatly increase under a moderated overhead.

The Brody & Funt Co., Inc., 134 West 37th Street, New York City, manufacturers of ladies' coats, advise through

Mr. Henry Brody, treasurer, that they travel 18 road representatives, and whereas formerly these men traveled from 33 to 38 weeks a year they have not exceeded 15 weeks in 1920. "The high railroad fare and excessive charge for excess baggage compelled us to curtail trips of all men. If rates would be reduced, our men would travel during 1922 at least 30 weeks per year each."

Niagara Wall Paper Co., Niagara Falls, N. Y., wall-paper manufacturers: Mr. C. J. Rush, sales manager, states that under reduced overhead the result would be more travel, more freight, more business.

251 Hirachberg & Co., 339 Fifth Avenue, New York City, manufacturers of headwear, advise through Mr. Sidney G. Hirachberg, president, that lower rates would bring about decided economy and inducement to extend their territory.

The Whitaker Paper Co., Baltimore, Md.: Mr. J. Evan Reese, managing director, reports they traveled 23 salesmen. The expense of traveling is so heavy that it curtails their efforts and also forces their men to travel less than they would otherwise do. If the pro-

posed legislation passes it will doubtless stimulate the action of traveling men, and it would have a wholesome effect on business generally. There is no question in the world but that the amount of traveling done by salesmen since the present high cost of transportation has been in force has been materially reduced. If this cost is reduced, the territory will be flooded with traveling men, and where the traveling man goes there is business. They create business.

Richard E. Thibaut, Inc., No. 153 Madison Avenue, New York City, wall paper, advise that they now use motor cars as transportation for their travelers.

Geo. W. Helme Co., 111 Fifth Avenue, New York City, tobacco, travel 50 salesmen continuously. Mr. J. C. Hartley, sales manager, states that nearly all of their salesmen are using automobiles at present.

Edison Portland Cement Co., 8 West 40th St.: W. D. Cloos, vice president and general manager, announces that they travel 27 representatives, and further states "practically all of our sales force now cover their territories in automobiles. If the railroad rates should be reduced $33\frac{1}{3}$ per cent, it is possible that our salesmen could cover their territories with the same efficiency at greatly reduced cost per unit."

Williams Piano Co., Sioux Falls, S. D.: Mr. A. E. Godfrey
252 announces that their sales force was diminished from 10 salesmen in 1917 to 4 salesmen in 1921 and the number of weeks they traveled was greatly diminished, adding that under decreased traveling rates they could increase their railroad travel 100 per cent.

Gottschalk Steinberg & Co., Inc., 87 Fifth Avenue, New York City, veillings, etc.: Travel about 15 men, making six business trips during the year. They advise that the expense of traveling has been entirely too high. " $33\frac{1}{3}$ per cent reduction would be a great boost to business, not only in giving us a chance to have a larger sales force, but no doubt help reduce the cost of merchandise."

W. L. Douglas Shoe Co., 127 Duane Street, New York City.: Mr. Frank L. Erskine, director, advises that they travel 32 salesmen and that a decreased rate in traveling would enable these men to go into smaller towns, resulting in increased business.

Brown, Durrell Co., 11 West 19th Street, New York City, hosiery and underwear: Mr. D. F. George, of their sales department, advises that they travel from 60 to 65 salesmen and the lowering of passenger rates would enable 75 per cent of their men to call more often on their customers and sell more merchandise.

R. C. Williams & Co., 56 Hudson Street, New York City: Mr. W. L. Juhring states that they travel 100 salesmen almost the entire year; that a $33\frac{1}{3}$ per cent reduction would give them an opportunity of covering many more small towns, which they avoid on account of excessive cost to reach such points.

Jos. Musliner & Co., Inc., 101 Gold St., New York City, wholesale leather: Mr. Silas Musliner, president, states that in the event of the

reduction of rates they would possibly increase their traveling 20 per cent.

253 H. R. Mallinson & Co., Inc., 299 Fifth Avenue, New York City, broad silks: Mr. John Clingen states that they travel 20 representatives and they would consider seriously certain territories which they have not covered if rates were reduced.

The McCall Company, 236 West 37th Street, New York City, dress patterns and publications: Mr. Fred'k B. Davies, sales manager, states that they travel on an average of 25 road representatives. "That the proposed mileage book at 33½ per cent would reduce our cost of selling and make possible the augmenting of our staff and the working of smaller towns."

Hindes & Cross, 15 East 26th Street, New York City, manufacturers of women's coats: Mr. H. Hotchkiss states that under a 33½ per cent reduction they would travel at least 33½ per cent more.

W. J. Sloane, Fifth Avenue and 47th Street, New York City: Nelson S. Clark, director, states: "We are thoroughly in sympathy with the movement of your association. We believe that the railroad fares now in existence and excess baggage are a detriment to the country as a whole, as it certainly lessens the availability of a traveling force, and has with us, and we are in hearty accord with your efforts to obtain mileage books, and we would also say baggage books for excess, as we think we enjoyed some years ago. This would enable us to have our representatives more freely on their territories, and would, in our judgment, stimulate the activity of the traveling forces of the country as a whole."

Fred'k Vieter & Schelis, 65 Leonard Street, New York City, cotton goods and yarns: Mr. T. Holt Haywood states that the present rates have been a great hardship for all firms traveling a number of men. We are traveling in this department from 13 to 15 men who cover the country from coast to coast and visit every city of
254 consequence in every State, and on account of the rates which have recently prevailed, our men of course have not traveled as extensively as they might otherwise have done. There is no doubt that if the mileage books could be issued, it would be a very material incentive to travel our salesmen very much more than we have done in the past.

American Sponge & Chamois Co., 47 Ann St., New York City: Mr. A. J. Sloss, president, states: "We are heartily in sympathy with your efforts to have mileage books issued by the railroads for traveling salesmen. Our own business has been seriously affected by the high passenger rate charged at present to salesmen and we have been compelled to increase salesmen's commission to cover their increased traveling expenses. This increase we have naturally been compelled to pass along through the prices of our merchandise and we feel very strongly that inasmuch as the salesmen travel not for pleasure, but for business, that he is entitled to a lower rate than the ordinary occasional traveler. We sincerely hope the interchangeable mileage book will again be put into use with success."

A. M. McPhail Piano Co., 120 Boylston Street, Boston, Mass.: Roger S. Brown, vice president, states: "I am thoroughly in accord with you about this mileage question. We certainly would spend more time on the road and have more men out if we could get a mileage that we could use on all the roads at a reduction of such as 33½ per cent, but at present our output is curtailed on account of the enormous expense of selling, which of course includes railroad and Pullman rates. I shall be pleased to do anything I can to assist this good work and you may call on me at any time."

C. H. Crowley, 339 Broadway, New York City: They are now traveling 15 representatives, selling machine needles, cutlery, and that they would double the number of men if railroad fares were reduced to a reasonable rate such as is proposed in connection with the interchangeable mileage book.

S. S. Stafford, Inc., 603 Washington St., New York City, manufacturers of ink: H. A. Barrett, sales manager, states: "We are deeply in sympathy with your move. We employ approximately 25 to 30 salesmen a year, who make from 2 to 4 trips over each territory. We have been reluctant to place additional men on the road on account of the excessive traveling expenses since 1917. Our average transportation fares at the present time, not taking into consideration special trips which are frequently necessary, are about \$12,000 per year. Notwithstanding this fact, if the interchangeable mileage book is issued at a 33½ per cent reduction, we would add to our selling forces."

E. T. Eberhardt & Co., 874 Broadway, New York City, advises that traveling by their staff of salesmen was reduced fully 20 per cent during 1920-1921 on account of the high expense rates. Furthermore, they were compelled to reduce their lines from a trunk line to a suit-case line, as the expense of carrying a trunk was so high as to make it undesirable. In addition they state: "We believe that a reasonable reduction in general traveling expenses, and particularly in railroad fares, would increase the amount of our traveling immediately to the mileage covered in 1917-1918, amounting to an addition of 20 to 25 per cent over the present rate."

Butler Brothers, 495 Broadway, New York City: Mr. G. M. Marshall, sales manager, states that they would send out traveling salesmen on the road. "We do have a force of approximately 30 men who call on our customers in the eastern half of the United States. These men naturally do considerable traveling, and if Congress should order a mileage book to be issued at rates lower than those prevailing, we would undoubtedly travel more men on this work."

Atterbury Brothers, Inc., 145 Nassau Street, New York City: Mr. H. E. Atterbury, president of this company, states that the expense account of our firm relative to mileage for their salesmen has decreased and in place thereof they have been increasing the use of telephone and telegraph. "We estimate a 33½ per cent reduction in rail-

road fare would result in a 25 per cent increase in the amount of traveling which would be done by our salesmen."

Fred Butterfield, Inc., 361 Broadway, Mr. A. H. Zeller, vice president, writes: "We are naturally very much interested in your efforts to obtain mileage for road travelers, as it would mean considerable saving to us, and would automatically help affect the selling price of our merchandise."

Best & Co., 372 Fifth Avenue, New York City: Mr. Philip Boutilier, general manager, states: "We have on the road 8 months out of 12 two selling representatives, each of whom takes two assistants and seven trunks. In addition, we have one other representative on the road three months each year, who takes three trunks. The extremely heavy passenger and excess-baggage charges have practically eliminated what profit there has been in this road business, and if some relief is not had it may be advisable for us to withdraw our road people. The service which we offer to our customers by this road business is very much appreciated by them, and the business runs into very substantial figures, but the returns to us are not commensurate with the effort and service given. We hope that you will press this campaign successfully."

Bell Bag Company, 63 Front Street, New York City: Mr. Samuel T. Bell, president, announces: "Ever since increase of railroad
257 passenger rates we have been obliged to curtail railroad travel, as this expense had to be placed on the cost of goods and find buyers unwilling to pay for it. We are using the telephone (long distance) more frequently, but it is not as satisfactory as personal contact. We certainly would travel oftener if rates were lower."

Wm. Anderson Textile Mfg. Co., 48 White Street, New York City: Mr. J. R. Strohecker, assistant secretary and treasurer, states: "We assure you that we are in accord with your efforts to have passenger rates reduced by the issuance of mileage books. Traveling costs have increased so materially as to become a factor in determining the cost of our merchandise. It has been our observation during the past few years that because of the increased railroad rates they have not traveled as extensively as heretofore, with the result that we have lost an amount of business that ordinarily we would receive. A reduction in railroad rates would enable them to travel more extensively, obtain a larger volume of business, which necessarily would result in a larger income to the railroads because of increased shipments. We are of the opinion that if traveling expenses are reduced it will have a subsequent effect on the cost of merchandise to the ultimate consumer."

Grinnell Brothers, Detroit, Mich.: Mr. S. E. Clark, secretary, states: "It is getting to a point where the expenses are so heavy that few men can make good, and unless some change is made so traveling expenses can be reduced we shall be obliged to abandon that method of trying to do business. We believe railroad fares are too high and the railroad companies will get much less of our money for railroad fares on the present basis than they would get if railroad fares could

be reduced considerably. We have covered the entire territory of Michigan for a great many years, but the heavy traveling expenses is making it a severe problem as to whether or not we can continue. We could probably supply our salesmen with automobiles and we shall have to do that or something like that unless we get some relief in railroad fares."

Eisenstaedt Bros. Co., 320 South Franklin St., Chicago, Ill., manufacturers of men's neckwear: Mr. Harry Eisenstaedt, secretary, states: "In 1917 each of our salesmen made four trips. For the past three years they made three trips per year. During 1919, 1920, and 1921 our men were obliged to cut down one trip per year, owing to the great expense they were under, as our men travel on strictly commission basis and pay their own expenses. During the past two years we were obliged to change men more often than ever before. We believe that if an interchangeable mileage book at 33½ per cent reduction was issued our men would be more willing to stay out and work their territory closely and we would get back to the four-trip basis, but at present, with the high rates of railroads, hotels, and baggage transfer, we can not insist that our men should spend their money without getting reasonable results."

Cushman & Denison Mfg. Co., 120 Eleventh Avenue, New York City: Mr. D. C. Cahalane, secretary, states that the proposed mileage legislation is very conservative, and the concession asked for most reasonable; that every concern using traveling men have found restrictions in regard to mileage, coupled with the high rates, almost prohibitive. During the last two years we have been obliged to curtail along this line—instead of traveling more men we have traveled less men and have conducted a certain part of our business by mail which was formerly handled through travelers. Unless relief is granted there will be a further restriction in traveling and the railroads themselves will eventually be the losers. Lower rates would stimulate traveling and would be of mutual benefit to everybody concerned.

Mitchell Brothers, Inc., 594 Broadway, New York City, manufacturers of ladies' undergarments, assert that they are heartily in accord with the movement on foot regarding the issuance of mileage books, indicating that it would mean a great deal to them in the way of larger sales because their representatives frequently do not make intermediate stops because of expensive railway costs and do not cover their territory in full as expected of them.

International Tailoring Co., 4th Avenue and 12th St., New York City: Mr. R. H. Reiss, treasurer of this company, writes: "Our traveling men cover every State in the Union, making all towns of 500 and upwards, for the purpose of appointing new accounts for us and promoting the general interests of the firm to increase sales. The extent of our business requires that we increase our present sales force of 17 men, but we are not going to do so at the present time because of the high cost of travel. We feel that if

we should place more men on the road and if railroad traveling expenses were not exceptionally high that we would be able to increase our business. We appreciate any action on your part to influence Congress to pass an act providing for the issuance of an interchangeable mileage book at $33\frac{1}{3}$ per cent reduction."

The York Card & Paper Co., York, Pa.: Mr. John S. McCoy, general manager, states: "Our sales force consists of 12 men. Previous to the war it was our custom to send the men out on three trips per year, aggregating between 7 and 8 months of actual traveling. On account of the high cost involved we told our salesmen to let the customers know that we would only make one trip per year, and this procedure resulted in cutting the traveling expense to one-half of what it was formerly or less. If it were possible to secure mileage books at a reduction of $33\frac{1}{3}$ per cent, it would 260 undoubtedly result in our men going back to the old traveling schedule lasting from 7 to 8 months in each year."

National Ribbon Company, 440 Fourth Avenue, New York City: Mr. Adolph Miller, secretary and treasurer, states: "We have felt very keenly the constantly increasing expense both of the railroad as well as the Pullman accommodations, and would therefore greatly welcome any step which will result in a material reduction of our traveling expenses."

Kipp Phonograph Co., Indianapolis, Ind.: Mr. W. E. Kipp states: "We are very positive that we would undoubtedly increase our efforts so far as sending travelers out if we could see some relief from the high cost of it."

J. W. Jenkins Sons Music Co., Kansas City, Mo.: Mr. S. D. Beatty states: "We have been compelled to curtail our traveling, and now out of the 12 stores that we operate throughout this section of the country we are sending men on the road only for the more important business. We can not afford to send out the number of traveling men or make the number of trips that we could formerly afford to make, for the reason that the traveling expenses are so excessive cost, as compared with the cost of 1917 and earlier, that we can not take the chances that we formerly could take, and our sales for this reason have been curtailed, for we only go after out-of-town business when it is absolutely necessary, and when we are practically sure of getting it by sending a representative."

D. Strauss Co. (Inc.), 79 Fifth Avenue, veilings, reports: "A reduction in the mileage charged, especially for our traveling salesmen, would enable our men to take longer or more trips, thereby selling more goods and helping a quicker return to the prosperity of the country. A lower traveling rate would be of more benefit 261 to the average salesman, thereby increasing his purchasing power and creating a larger demand for merchandise, which will be beneficial to the country at large."

G. & H. Fuld, 1140 Broadway, New York City, state: "We are strongly in favor of the issuance of an interchangeable mileage book at a reduced rate, owing to the fact that a great many of our men

are on a commission basis and as they pay their own expenses it would help increase their incomes. Furthermore, reduced mileage rates would encourage more traveling men to go on the road, and thereby help the railroads considerably."

Haviland Shade Roller Co., 407 Broome St., New York City: Mr. Marston Haviland states: "We have been obliged to considerably curtail the amount of traveling done by representatives on account of the high railroad fares because the volume of sales secured did not increase in anything like the proper proportion to pay for these expenses. We feel that if railroad fares were reduced 33½ per cent in connection with an interchangeable mileage book, that we would readily be disposed in keeping our men on the road much more continuously than we are now doing, which would result in mutual benefit to the railroads themselves."

E. M. & F. Waldo, 11 Broadway, New York City: Mr. Frank Waldo states: "Owing to the great cost of traveling, we have been unable to do as much road work as conditions really demand. It would be possible for us to increase our traveling to an appreciable extent if an interchangeable mileage book would be issued at a reduction of 33½ per cent."

M. S. Mork & Company, 21 West 4th St., New York City, manufacturers of straw hats: Chas. A. Wood, treasurer, states: "In former years we thought nothing of sending our representatives out on the road as often as 6, 8, or 10 times in order to visit their trade, whereas to-day we take to the road as infrequently as is possible, and we believe this is true of most of the houses in our line. We trust that you will be able to stress upon Congress the importance of the issuance of a mileage book, as this will encourage us to make more frequent trips."

Holsten, Young & Co., 34 West 27th street, New York City, automobile and rain coats: "In the last few years our salesmen have not traveled as much as they should, owing to the great expense connected therewith. If the mileage and excess baggage rates could be reduced we think it would have a tendency for all concerns to employ traveling salesmen to keep their men on the road longer and have them make more frequent trips. We trust that your efforts will be successful in obtaining a reduction in both mileage and the excess baggage rates in addition thereto."

Voss & Stern, Fifth Avenue at 15th Street, New York City: "We wish to go on record as being decidedly in favor of the issuance of mileage books on all our railways. There is absolutely no doubt in our mind that general traveling has been curtailed through the extremely high rates prevailing, and we are decidedly of the opinion that the railways would receive a total sum which would be at least as much as they are now collecting, through the increased travel that would take place if the rates were reduced. A reduction of rates, to our way of thinking, will enable American industry to serve the country more effectively and go a great way towards establishing true prosperity."

Edmonds & Lefkovics, 1 East 33rd Street, New York City: Mr. C. G. Edmonds states: "I heartily endorse the effort you are making for the reduction in rates, as the cost of traveling is so excessive that I have often wondered how it is possible for anyone depending upon road business to pay the railroad rates which we are now being charged. In making our trips to Chicago, Kansas City, and beyond it is necessary to carry two wardrobe trunks, and considering the charges which we are called upon to pay reduces the profit so materially that it is a question whether these trips are well advised. An interchangeable mileage book at 33½ per cent reduction would certainly change the expense."

263 Utz & Dunn Co., Rochester, N. Y., women's shoes: Mr. M. E. Smith, sales manager, states: "We travel 24 salesmen and if we have the benefit of an interchangeable mileage book at a savings of 33½ per cent the immediate result would be an increase in the number of weeks which each salesman travels."

Henry Glass & Co., 46 White Street, New York City, linen importers: Mr. Leopold Davis, treasurer, states that they traveled from 15 to 20 representatives and the high cost of travel has reduced the number of trips, that with more favorable rates they would increase their road activities.

Habicht & Co., 161 Hudson Street, New York City, importers of fruit products, state that they travel 18 representatives, adding that if traveling were cheaper more salesmen would be employed and it would stimulate their traveling and increase it.

Continental Paper & Bag Mills, 16 East 40th St., New York City: According to Mr. J. C. K. Jordan, assistant secretary, they employ approximately 50 men, of whom 35 have been constantly on the road and the balance have not done so because of the very high rates, and adds that under a moderated cost as proposed in the issuance of an interchangeable mileage book, that they would reduce their expenses considerably and help to reduce their cost."

The Tait Paper & Colo Industries, Inc., Glens Falls, N. Y.: 264 Mr. T. S. Marshall, vice president and general manager, wall paper division, states that they traveled 24 salesmen in 1917 at an average of three trips a year, on an average of 30 weeks each, and carry four trunks over each territory. The effect of the high cost of travel has diminished their force to 16 and under a more favorable rate they would probably increase their sales force without delay.

Hydeman & Lassner, 105 Fifth Avenue, New York City, veils and veilings, etc.: Mr. H. Haelel states that they employ 20 salesmen who make from five to six trips a year, totaling about 40 weeks of travel. Their force has been diminished because of the high rates and that a reduction in rates would cause them to stay out longer and make more towns which they do not cover now because of the high tariff.

National Gum & Mica Co., 59th Street and 11th Avenue, New York City: According to Mr. A. E. Wilbur, sales manager, they travel

from 12 to 14 men, some of whom previously traveled the year round, but on account of the great expense for road traveling they have decreased their activities, but adds that a reduction of rates in connection with an interchangeable mileage book as proposed would cause them to increase their road activities.

Henry C. Kelley Co., 12 Walker Street, New York City, twines, yarns, cordage: A. W. Archer, vice president, states that they have reduced their traveling force from 8 men to 4 because of the road expenses.

Russell Playing Card Co., 200 Fifth Avenue, New York City: Their sales manager states that they would probably increase the extent of their traveling under a moderation of cost in travel.

The Esterbrook Steel Pen Mfg. Co., Camden, N. J.: Mr. H. C. Sharp, sales manager, states that they would consider
265 seriously adding to their selling force for 1922 if a mileage book at 33 $\frac{1}{3}$ per cent reduction were issued.

S. Augstein & Co., Elmhurst, N. Y., manufacturers of sweaters and knit goods: Mr. D. Millhauser states that they traveled from 12 to 18 men in 1920 and 1921. Individual trips were shortened owing to the high cost of travel.

Titus Blatter & Co., 162 Fifth Avenue, New York City: Mr. G. S. Hoffman, director and sales manager, states that they have reduced their sales force due to the high cost of travel and that under more favorable rates there was a possibility of their salesmen extending their business trips.

F. O. Pierce Co., 12 West Broadway, New York City, paints and varnishes, state that in 1917 they traveled 14 men and in 1921 they traveled but 12 men. Mr. Henry A. Fitch, sales manager, states that they have dropped several of their men and would increase their selling force should an interchangeable mileage book be issued.

Fred'k Hacker & Co., 31 West 21st Street, New York City, employ 25 salesmen. Mr. David Little, sales manager, states that they would enter territory where at present the cost of travel is excessive and prohibitive if an interchangeable mileage book were issued.

Greenebaum Bros. & Co., 22d and Arch Streets, Philadelphia, Pa., travel 22 representatives. Mr. R. Hamill D. Swing, jr., states with a 33 $\frac{1}{3}$ per cent reduction in railroad fares they would be able to concentrate their territories, make smaller points, which means we would use a larger sales force, sell more, and get a great distribution of their merchandise.

S. & A. Stern, 87 Fifth Avenue, New York City, laces and embroidery, state that they have traveled much less than usual
266 because of excessive cost of transportation. The cost of merchandise to-day is half what it was when these excessive rates were put on, and therefore the traveling expense is beyond proper proportion. If the cost of transportation were cheaper, it would mean that more business would be created, for then we could afford to send men on the road profitably.

Campbell, Metzger & Jacobson, 93 Broadway, New York City, manufacturers of fancy goods: Mr. David Metzger states that a reduction in rates would stimulate their business.

267 I. Ginsberg & Bros., 102 Madison Avenue, New York City, manufacturers of wash dresses and uniforms, state that their 12 representatives would travel more frequently under more favorable rates.

Perlman Cycle & Auto Supply Co., 34 Warren Street, New York City, advise that they would put on extra selling force under more favorable traveling overhead.

National Sponge & Chamois Co., Inc., 158 William Street, New York City: Mr. J. H. Mathios, secretary, states that their men have traveled less in the last several years on account of the high cost of travel. Under more favorable railroad rates they would increase their amount of traveling.

Finsilver, Still & Moss, 225 Fifth Avenue, New York City, woolens & silks, state that they would increase their staff the moment traveling rates were more encouraging.

A. L. Clark & Company, Inc., 311 Sixth Avenue, New York City, staple notions and small wares, state: "The general selling cost, of which railroad fares and baggage were the greatest part, increased to such proportions that in July, 1921, we were compelled to withdraw our men from the road entirely, and for the last six months of 1921 they did not travel at all. Furthermore, for the present year we are preparing lines by photographs, etc., so they will only carry a special handcase, no trunks whatsoever, in order to average by saving on baggage and transfer and equalize on actual expense. Should an interchangeable mileage book be issued at 33½ per cent reduction, we should not only increase but also return to sample trunks and arrange to increase the weekly travelers' period as well."

Edwin Sommerich, 40 West 32nd Street, New York City, millinery: Mr. Edwin Sommerich states that they reduced their 268 sales force from four to three representatives and the number of weeks traveled from 22 to 17, showing a decrease in travel of 37 weeks, excessive railroad rates and hotel charges being the cause of the reduction of road men. 1917, 4 men traveled 22 weeks each, total 88 weeks; 1921, 3 men traveled 17 weeks each, total 51 weeks; net loss 37 weeks.

A. M. McPhail Piano Co., 120 Boylston St., Boston, Mass., manufacturers of pianos: One representative formerly traveled about ten months and the other half the time. On account of the present railroad rates all road sales efforts have been abandoned; net result, loss of 60 weeks.

Stone Piano Co., Fargo, N. D., pianos and musical merchandise: Mr. A. G. Stanton, secretary and treasurer, advises they traveled 6 men 50 weeks each per year. In 1921 they retained only 3 salesmen, with the exception of about 3 months a year, when 4 were on the road. We find it cheaper to supply cars, and with the exception of

one man each has been using automobiles almost exclusively during 1921.

E. Ries & Co., Inc., 110 Fifth Avenue, New York City, lace curtains: Mr. Carl Ries, president, states that they have maintained a sales force of 10 men, who prior to 1919 traveled 30 weeks a year, since that time but 22 weeks a year, showing a net loss of 20 weeks in travel. 1917, 10 men traveled 30 weeks each, total 300 weeks; 1921, 10 men traveled 22 weeks each, total 220 weeks; net loss 80 weeks.

Klauber Bros. & Co., 877 Broadway, New York City, laces and embroideries: Employed about 30 salesmen, who formerly made 3 trips a year, totaling 8 to 9 months on the road. Since 1920 many of their representatives only made 2 trips a year, total of 6 or 7 months.

Klinger & Co., 737 Broadway, New York City, manufacturers of boys' waists and pants: Mr. Adolph Klinger states that they reduced their sales force from 8 representatives to 5 representatives and the period of time on the road from 26 to 20 weeks, showing net loss of 108 weeks of travel, for the reason that traveling was too expensive, and they had to reduce their force. If an interchangeable mileage book were issued at 33½ per cent reduction, they would increase their selling staff. 1917, 28 men traveled 26 weeks each, total 208 weeks; 1921, 5 men traveled 20 weeks each, total 100 weeks; net loss 108 weeks.

Fleischaker & Baum, 45 Greene Street, New York City, manufacturers of dolls: Mr. J. L. Hackel states that their sales force has been reduced from 6 men to 3 men and the number of weeks of traveling from 18 to 14 and the number of trunks traveled from 3 to 1. Net loss 56 weeks of traveling due to increase in traveling expenses. 1917, 6 men traveled 18 weeks each, total 84 weeks; 1921, 3 men traveled 14 weeks each, total 42 weeks; net loss 42 weeks.

Samuel Buyer & Co., 935 Broadway, New York City, notions: Mr. Albert Wolfe states that they have reduced their sales force from 6 men to 3 men; the number of trips from 5 to 3; the duration of each trip, formerly 6 to 7 weeks, to 5 weeks; net loss 155 weeks. They attribute the shrinkage in road selling efforts to the high cost of travel, and add that they would increase their sales staff as well as their territories under a moderated cost. 1917, 6 men traveled 35 weeks each, total 210 weeks; 1921, 3 men traveled 15 weeks each, total 45 weeks; net loss 165 weeks.

Ode & Gerberoux, 421 W. Broadway, New York City, confectionery: Mr. Ode states that they traveled 6 representatives who make 7 business trips each year of 6 weeks each, and adds that if an interchangeable mileage book at 33½ per cent reduction is issued that they would double the extent of their traveling. This in itself would mean 252 weeks of constant traveling, adding to the income for the railroads.

Charles Scribner's Sons, 507 Fifth Avenue, New York City, publishers: Mr. J. L. Thompson, manager of the wholesale department,

states that they would doubtless increase the amount of their sales force and could through a reduction of mileage afford to make many cities which are not now visited because of the cost.

Japan Paper Co., 109 East 31st Street, New York City, importer of papers: Mr. Geo. A. Nelson, sales manager, states that they traveled 10 representatives, and adds that they would very much be encouraged to increase their traveling under more favorable rates.

Star Shirt Mfg. Co., 267 Fifth Avenue, New York City, manufacturers shirts and pajamas: Mr. Harry Bausher, vice president, states that they traveled 8 salesmen and that they would undoubtedly increase their sales force and extend their territory at a reduction in the cost of travel.

Hodges Fiber Carpet Co., 212 Fifth Avenue, New York City, wool and fiber rugs: Mr. David H. Miller states that a reduction of fares would mean more traveling for salesmen and keep every-
271 one and customers alike posted and better informed of business conditions.

Josiah Wedgwood & Sons, Inc., 255 Fifth Avenue, New York City, china importers: Mr. Geo. H. Service states that because of the high cost of travel it has been necessary to reduce their trips from 20 weeks to 10 weeks and likewise to reduce the amount of samples carried from 4 trunks to 2 trunks, adding that under more favorable transportation rates they would travel more and carry more sample equipments that in itself would add to the sale of merchandise.

Goldsmith, Stern & Co., 33-43 Gold Street, New York City, jewelry: Mr. Thos. S. Mack states that they would immediately add to their present selling force if an interchangeable mileage book at 33½ per cent was available.

F. C. Davidge & Co., South Bend, Ind., wall-paper manufacturers: They state that they have reduced their sales staff by one-half and also the number of months that their representatives travel, inasmuch as the traveling expenses have forced them to seek distribution through the efforts of the jobbers' traveling salesmen instead of their own. Mr. F. C. Davidge adds that he would immediately augment their sales staff under more favorable traveling rates.

The Sam'l C. Tatum Co., 2062 Reading Road, Cincinnati, Ohio, manufacturers of loose-leaf system and devices: They state that because of the high cost of travel they have reduced the number of weeks which their representatives covered the territory from 30 to 42 weeks and add that they would do more traveling under more favorable rates.

Metal Hose & Tubing Co., Raymond & Tillary Streets, Brooklyn, N. Y., gasoline and oil hose: Mr. J. M. Oden, president, states
272 that their sales force has reduced from constant all-year-round traveling to 24 weeks, due to the high cost of traveling, and that they would immediately increase their traveling force under moderated rates.

Stevens & Co., 375 Broadway, New York City, manufacturers of bicycle and automobile accessories and tools: Mr. R. E. Pye, sales

manager, states that they have reduced their sales force from 7 representatives to 3 and the number of weeks on the road from 40 to 35; net loss, 175 weeks. "Greatly increased expense was a large factor in our determination as to whether or not we would maintain our full force. Would increase the sales force 25 per cent and the weeks traveled proportionately if an interchangeable mileage book were issued at $33\frac{1}{3}$ per cent reduction." 7 men traveled 40 weeks, total 280 weeks; 1921, 3 men traveled 35 weeks, total 105 weeks; net loss 175 weeks.

Davidson & Schwab, 58 West 40th Street, New York City, manufacturing jewelers: They state that the increased cost of traveling has reduced their road traveling and they would undoubtedly increase the same under more favorable road conditions.

Montana Phonograph Co., Helena, Mont.: Mr. H. G. Parchen, manager, states that one representative, beginning June 1, 1921, and ending December 31, 1921, used scrip books for \$471.20, including war tax. He would be out on the territory almost continuously if rates were lowered to a proper degree. At present writing he goes out only when absolutely necessary.

Boyden Shoe Mfg. Co., 185 Washington St., Newark, N. J., manufacturers men's high-grade shoes: Mr. Slavens, president, states that as conditions now stand all salesmen hesitate about making additional trips, but at a reduced rate of $33\frac{1}{3}$ per cent promised he will
 273 welcome the opportunity. Furthermore, it will induce many manufacturers to increase the number of their travelers and to cover territories much closer than they have in the past few years, due to heavy transportation charges. In our opinion, railroads will be more than compensated for any loss they may sustain in granting the traveling salesmen of America a concession of $33\frac{1}{3}$ per cent rate on a mileage book, by increased mileage of travel, increased number of salesmen that will be added to the traveling force, and by the increased amount of freight that will follow in the path of each salesman.

Union Bag & Paper Corp., 276 Drexel Bldg., Philadelphia, Pa.: Mr. H. C. Hancock, manager of the Philadelphia branch, states that 8 of their representatives covered 71,668 miles during the year 1921, adding that under reduced rates that towns would be visited more frequently, therefore greater mileage would be used in 1922 if the rates were sufficiently moderated.

The Monarch Company, 718 Broadway, New York City: Mr. B. Cohn states that a reduction of $33\frac{1}{3}$ per cent under existing rates would tend to help in more ways than can be described or imagined because the reduced rates would encourage travel to a far greater extent. At present there is altogether too much "lay-off" between trips. This is due to the fact that railroad fares are exorbitantly high and the average traveler cannot make both ends meet after continuous traveling.

D. Armstrong & Co., Inc., 155 Exchange St., Rochester, N. Y., women's shoes: Reduced their sales force from 6 to 4 men, traveling

20 weeks per year, showing a net loss of 40 weeks of travel. 1917, 6 men traveled 20 weeks each, total 120 weeks; 1921, 4 men traveled 20 weeks each, total 80 weeks; net loss 40 weeks.

274 Adler & Adler, 396 Fifth Avenue, New York City, manufacturers of waists: Mr. Leo P. Weintraub states that they traveled 5 salesmen, reducing the number of trips per year from 6 to 4, which automatically reduced their traveling from 35 weeks per year to about 22 weeks annually. Net loss, about 62 weeks a year.

King & Applebaum, 333 Seventh Avenue, New York City, ladies' dresses: Mr. John Allen King states that they employed, in 1918, 28 salesmen, each of whom carried 2 trunks and made 4 trips a year, totaling 30 weeks each of travel. Net loss to the railroads, 540 weeks. They attribute the high cost of traveling and general conditions as the cause of discontinuing all road salesmen.

R. H. Sircom & Co., Melrose, Mass., petticoats: They maintain a sales force of 9 men who formerly made 6 to 8 trips a year; now reduced to 3 or 4 trips. Formerly traveled 40 weeks a year; now, 25 to 35 weeks. Net loss, 90 weeks. The reason for diminished travel is the high cost, Mr. J. D. Bullene, assistant treasurer, states.

Deutz & Ortenberg, Inc., 2 West 33rd Street, New York City, manufacturers ladies' waists: Herbert J. Deutz, president, states that their four representatives formerly made 4 trips a year, total of 5 months of travel, whereas they now make but 2 trips, totaling one month. Net loss, 16 weeks. He adds that their representatives would naturally travel considerably more at a lower cost, so that their own incomes would be increased.

Henry H. Finder & Co., 498 Seventh Avenue, New York City, manufacturers of coats and suits: They state that their traveling has decreased because transportation rates are too high, adding that their salesmen would travel more often and at a longer period at a moderated cost.

275 Wm. Strauss, Inc., 18 West 22nd St., New York City, manufacturers of boudoir caps: Mr. Wm. Strauss, president, advises that increased efforts to market their goods and a longer period of travel would result if an interchangeable mileage book were issued at 33½ per cent reduction.

Metal Stamping Company, Long Island City, N. Y.: Mr. R. A. Picard, sales manager, states: "We want to highly endorse the work you are doing in connection with recommending an interchangeable mileage book at 33½ per cent reduction. We have already written our Senator, inasmuch as we are certain that the high traveling rate now is increasing sales expense all over the country and the consumer is paying for it. If there is anything we can do to assist you, do not hesitate to call on us."

E. H. Behrens & Co., Inc., 57 Worth Street, New York City, advise: "We are very much interested in the matter of reissuance of mileage books, as our expenses for traveling are very large and this reduction of rates will be of material help to us in these hard times."

Jaburg Brothers, Inc., 10 Leonard Street, New York City, state: "Our salesmen are on commission and pay their own expenses. We are deeply interested in a reduction of traveling expenses. Should the railroads issue an interchangeable mileage book, it would be of material benefit to the country at large."

Claffin, Thayer & Co., 58 Reade Street, New York City, manufacturers of boots and shoes: Mr. E. C. Thayer writes: "Most of our salesmen travel in the metropolitan district. Our out-of-town salesmen use automobiles chiefly. We are therefore not so directly interested in an universal mileage book, but we can thoroughly
276 appreciate the convenience it would be to salesmen covering extensive territories and using the railroad almost exclusively. Railroad fares and freights at present are still on a war basis, and while the railroads are making no money because railroad wages are still on a war basis, we believe there can be no general improvement in business until fares and freights are materially reduced."

Thomas A Edison, Inc., Orange, N. J.: Mr. T. J. Leonard, general sales manager of the musical phonograph division, advises: "This particular branch of the Edison interests does not employ traveling salesmen; our executives, however, do considerable traveling, and from that standpoint, but more particularly for the reason that our jobbers, through whom our phonographs and recreations are distributed, employ quite a number of travelers, we are very much interested in your propaganda for the issuance of mileage books. My suggestion is that you address a questionnaire to each of our jobbers for the particular attention of the executive whose name appears on the attached list of jobbers. I should say that the combined traveling staff of all jobbing points will approximate 100 men. I should like also to suggest that you address a questionnaire and literature on the subject to the following executive of other departments of the Edison interests." "Unquestionably the issuance of mileage books effecting a reduction in cost of travel would have a stimulating effect upon our business, and we are very much interested in your efforts, for which we wish early and definite success."

277 Cross-examination.

Railroad fares make from one-quarter to one-third of the expense paid by a traveling salesman. He will travel on the average from 50 to 100 miles a day. Someone has estimated that a salesman will travel 50 miles a day, but that is after he reaches his territory. To get to his territory he has to travel from 100 to 3,000 miles and the same distance returning from it.

The majority of the members of our associations are located in the East and Middle West.

I think 20 to 25 per cent of the total passenger travel would be on the scrip tickets if sold at a reduction of one-third.

In the vast majority of cases the salesman travels upon a commission basis, and all expenses, including railroad fares, are charged against the commission, so he bears them.

I have not figured out in dollars and cents how much the carriers' loss on the scrip books would be in making my estimate that the loss would be offset by the increased travel.

There were approximately 250 or 300 letters sent out in this questionnaire. We received possibly around 140 or 150 answers.

"Q. And you have included in that statement all of the answers?

"A. All that were intelligently replied to.

278 "Q. You mean you have omitted some that were sent you?

"A. Yes, sir. As an example of some of those that I have omitted, I will show you two that are typical. Here is one concern:

"How many salesmen did you employ who traveled each year from 1917 to 1921?"

"No answer to that question.

"How many business trips did each salesman make?"

"No answer.

"How many weeks did each salesman travel?"

"No answer.

"How many trunks did each salesman carry?"

"None."

"If the answers to the foregoing question indicate that the road traveling of your representatives had been diminished in 1920 and 1921, please state fully the reason."

"No answer.

"If Congress should order a mileage book to be issued at a reduction of from 25 to 33½ per cent under existing rates, what effect would it have in 1922 upon your sales staff and the extent of its travel?"

"Increase it."

"But he gives no reason for it. It is absolutely valueless to you or to us.

"Here is another one: He leaves every question blank; doesn't say anything at all. He just makes some dashes and says nothing; no summary or anything else. It is absolutely valueless.

"Answers of that type have been entirely omitted, because they served no purpose either for you or for us."

279 JAMES C. LINCOLN testified: I am traffic manager of the Merchants' Association of New York, an organization composed of over 6,000 members, embracing every line of commercial activity in New York City, including real estate, railroads, and banking and other interests. However, of that membership over 5,000 are engaged directly or indirectly in commerce and the promotion of business.

It is for the merchants and manufacturers that I am appearing at this time before the commission to give such light as I can upon the matters involved.

Under the provisions of General Order 28, issued by the Director General of Railroads effective June 10, 1918, all forms of mileage

books or reduced passenger fares were withdrawn and the minimum straight mileage fare was increased to 3 cents per mile. This minimum rate, under the authority of the commission in Ex Parte 74, was then increased to 3.6 cents per mile as the basic rate.

The withdrawal of the wholesale form of passenger transportation, mileage books—and when I say “mileage books” I will also include in that term scrip books, because they are two forms for accomplishing the same end—which the commercial traveler enjoyed, and which the employer of the traveling salesman previously enjoyed, placed upon these men increases in transportation costs out of proportion to the increases that were placed upon the general traveling public. For example, under General Order 28, where the \$20 per thousand mile book prevailed, the increased transportation charge paid by the commercial traveler was 50 per cent and where the \$25 per thousand ticket prevailed the increase was 20 per cent. Where the straight mileage basis prevailed, that was applicable to the general public, of 3 cents per mile, there was no increase made.

The increases in passenger fares, therefore, fell much harder upon the commercial traveler than any others making use of the passenger-train service of the carriers.

280 In these proceedings and in other previous activities in connection with the interchangeable mileage book, both before the Railroad Administration and with the railroads, we have been cooperating with the National Council of Commercial Travelers, which represented the traveling men and the men working on commission. It is for that reason I felt that I should appear in these proceedings to represent the merchant or jobber who employs traveling men and speak from his standpoint.

Some of our merchants with whom we have been corresponding and discussing the situation advise that by reason of the high cost of traveling they have been compelled to retrench in the number of salesmen employed; others have found it necessary to restrict the trips of the commercial traveler to the two intensive selling seasons—or more commonly termed buying seasons, looking at it from the consumers' standpoint—of spring and fall, depending upon the sale of goods between the seasons by correspondence and mail orders. In other words, the higher cost of traveling to the commercial traveler has restricted the number of trips, and has to some extent restricted the number of points at which he stops.

In many lines of business the expense attached to the selling and distribution of goods entering into interstate commerce represents a material part of the cost of the goods to the consumer and necessarily affects the cost of living.

Our merchants have expressed the view that if the direct expense of maintaining a corps of traveling salesmen can be reduced it will result in a more intensive use of the commercial traveler for the selling of their wares, by creating a spirit of rivalry and competition between these agents of the jobber and manufacturer by direct pres-

entation of the goods—showing to the consumer—which will mean
a renewed business activity, a bringing into commerce busi-
281 ness that would not otherwise move except by direct sollicita-
tion and showing of goods.

The commercial traveler is a regular and consistent patron of the railroads, and by reason of his vocation—that is, creating commerce, exchange of commodities between the different sections of the country—he is really the agent of the carrier as well as that of the merchant, in creating an interchange of goods between the different sections of the country, from the transportation of which the carrier secures the larger part of its revenues, the freight transportation representing revenues to the carrier that are beyond those of the passenger transportation.

It is our view that the commission should give most earnest consideration to a partial restoration, at least, of the pre-war services and charges by the establishment of an interchangeable mileage book—and, as I say, in using the term “mileage book” I am using it as covering the scrip book.

I have been asked by the Chicago Association of Commerce, its trade commissioner, to also express their sentiments—they were unable to be present—in favor of the interchangeable mileage book. They state that without question the lower mileage rates will increase travel, as the present cost of keeping men on the road is almost prohibitive, and no unnecessary traveling is being done. They state also that the merchants located in that territory say that their selling staff would be increased if they could reduce this overhead cost of commercial travel.

I also have a statement to make for the National Wholesale Grocers' Association of the United States, which reads as follows:

“The members of this association are wholesalers, distributors, and jobbers of groceries; that is, foods and kindred products. These wholesale grocers employ a considerable number of salesmen who travel and sell their goods to retail customers.

282 “The margins upon which wholesale grocers do business are narrow in the extreme, and no inconsiderable part of the cost of doing business is the item of transportation used by their traveling salesmen. Every endeavor is made by the members of this industry to reduce the cost of doing business so that the retail grocer and the consumer may be served at a minimum expense. It will be remembered that the goods in which they deal are the basic necessities of life and every effort is put forth to provide the public of this country with its food at as low a cost as is possible.

“Groceries may be conveniently divided into two classes, viz, staples, such as sugar, flour, salt, coffee, and the like, and foods which are not so common and essential, such as canned fruits, preserves, and a host of other items approaching almost the classification of luxuries. The former type of product is a basic necessary and not difficult to sell, while the latter, on the other hand, is susceptible to good salesmanship, and the business is intensely com-

petitive and must be vigorously sought. The sale of this type of goods can be developed by good salesmanship and salesmanship involves frequent visits to customers. Extraordinarily high passenger fares certainly are not conducive to any extensive sales campaign.

"The alleviation of these burdensome transportation charges would enable salesmen to make more frequent calls and trips and to include wider territory for the gathering of new business. The resulting new business for such increased selling activity would naturally be reflected in greater shipment of freight from the manufacturer and producer and reshipment by the jobbers and wholesalers, thereby benefiting the carriers themselves by producing increased revenues from this freight traffic.

283 "We recommend that a reduction of about one-third from the present passenger rates be made.

"In conclusion, we are firmly of the opinion that the resumption of mileage books by the carriers at a substantial reduction from the present rates will benefit not only the mercantile interests of the company but will result in substantial improvement and benefit to the carriers themselves. It is our genuine belief that such benefits will inure to ourselves and the carriers by increase in business and freight revenues."

The reduction in travel, to my mind, is due to two causes—the general business depression and passenger fares—not exclusively to one or the other.

J. S. TEDROW, appearing for the Chamber of Commerce of Kansas City, Mo., stated:

"I simply desire, on behalf of our organization and the members thereof who are engaged in general mercantile lines, wholesale, and so forth, and who employ a large number of traveling men, to concur in the testimony that has been offered on behalf of the traveling men's organizations and to state that our position is the same as theirs."

284 C. A. Fox, recalled by respondents, testified further:

With reference to commutation tickets, I think they increase traffic by inducing people to move from city to the suburbs.

There is a possibility of revenue losses to the Class I roads to the extent of the inability to make collections from small roads, and this would seem to be an impairment of the rights of such larger roads in case there should be any financial difficulties whereby the larger roads could not realize on the sales of such tickets. But nevertheless they would be compelled or would honor the tickets sold by the smaller roads. One of the reasons that deters us from suggesting that such tickets should be on sale at the small roads is the fear as to their financial stability and promptness of accounting for scrip that might be honored on other roads.

I would not be permitted, from the advice I have had from the passenger traffic officials, to state that it would be their view that the sale of the tickets should be confined to Class I roads or certain designated Class I roads and should not be allowed to be sold by the

smaller roads. There probably are some Class II roads whose responsibility is beyond question, and I would hesitate to make a definite expression one way or the other without further opportunity for conference on that point.

Except as to facts which have already been presented, carriers have at command no data of a statistical character as a result of experiences of the past in the sales of books over individual carriers and those of a joint character, good in a restricted region, that would afford foundation for definite, accurate conclusions as to what would happen if the commission should, contrary to the earnest representations of the carriers, require the sale of reduced rate scrip ticket. They have avoided mentioning specifically the extent of the possible losses because of this lack of dependable data.

In deference, however, to the request of the commission and as an earnest of their desire to contribute all possible light and assistance, estimates have been made in the form requested by the commission.

(The statements referred to were received in evidence, marked "Carriers' Exhibit No. 47, Witness Fox," and "Carriers' Exhibit No. 48, Witness Fox," and are found as Appendices A and B to the commission's report, 77 I. C. C., pp. 200, 221.)

To simplify the computation, I assume that in round figures the total average revenue derivable from ordinary one-way tickets sold at full normal fares to be about one billion dollars annually. This omits revenues from commutation, surcharge, and all forms of reduced-rate tickets.

286 It is most likely that the total realized from ordinary one-way tickets would be somewhat in excess of one billion dollars, but this factor would not have any considerable effect upon the percentages submitted.

It is a guess, except that we know rather accurately what the surcharge and the commutation are. As to what revenue is derived from the other forms, such as excursion tickets, we have no definite information.

While detailed statistics are not available, it is known that prior to Federal control, when mileage was actively on sale in the several regions of the country, about 18 per cent of the total revenue was obtained from holders of mileage tickets in New England territory; about 20 per cent in trunk-line territory; 20 per cent in southeastern territory; 15 per cent in southwestern territory. In Central Passenger and Western Passenger Association territories, where the 2-cent fare laws existed intrastate during the past 15 years, sales were practically negligible because of the fact such books as were on sale were only available for interstate transportation, the reduction in General Passenger Association territory at the time being only 10 per cent; therefore, the recent experiences in
287 those regions would be of no value as contributing light on this question.

Prior to the 2-cent fare laws, however, mileage tickets were sold very extensively throughout Central Passenger and Western Passenger Association territories, and their utilization was constantly increasing from year to year. In the extreme western part of the United States percentages as a territorial proposition are not available, but it is known that in certain instances in those regions the use of mileage was not so extensive as in the other sections referred to.

The foregoing information really constitutes the basis of my estimate.

As for to Federal control the mileage-ticket discounts were as follows, speaking generally:

New England, 10 per cent; in Central and Trunk Line Passenger Association territories, 10 per cent; in southwestern territory, 20 per cent.

In the Southeast, just prior to Federal control, authority was given by the Interstate Commerce Commission to advance the fare from 2 cents to 2½ cents per mile, but it was necessary to also approach the State commissions for authority to apply like increases intrastate. Before this latter procedure was completed the carriers were taken over by the Railroad Administration.

In southwestern territory the reduction was 16½ per cent; in a major portion of the western territory, 16½ per cent.

In the Central West, when the 2-cent rate was effective throughout the country, there was no reduction on the part of any line from the basic intrastate fares by the use of mileage, and a very considerable portion of the revenue of the carriers was derived from intrastate traffic in those States.

That was the general situation. There were some reductions which ranged greater.

288 The above percentages were intended to reflect conditions immediately prior to Federal control. They applied not only for the particular year prior to Federal control but also for some considerable period prior to Federal control, probably 8 or 10 years in certain territories. I could not tell the average reduction permitted on these mileage books prior to 1914, because there are a considerable number of mileage books sold of different denominations and by the individual roads and territorial books throughout the United States, and while it would be possible to make a tabulation that would give that accurately I could not possibly carry it in my mind. The percentages in times past were in excess of 10 per cent; in some regions running as high as 33½ per cent.

While the carriers have never had effective a nation-wide interchangeable mileage or scrip book of any character, except the present scrip book sold at full normal fare, it is the universal view of the carriers that the sales of such a book would be far in excess of any experiences of the past.

I estimate that 30 per cent of the present one-way travel at full fares would be made on an interchangeable scrip coupon ticket good for \$90 at standard fares, to be sold at \$72, or a reduction of 20 per cent, if such a ticket is issued. This is the best judgment of the carriers, but it is purely speculative.

Now, 30 per cent of the one billion dollars estimated above gives \$300,000,000 as my estimate of the present full fares of those who would use these scrip tickets, at a cost of \$240,000,000, instead of paying full fares.

289 In his testimony before the committee of the House,

David K. Clink stated: "It would seem no discrimination to grant a reasonable concession such as that asked for the traveling men, who spend nine months of the year on the road, averaging 50 miles per day, or 14,500 miles per year, as against the average citizen, who travels less than 100 miles per year. A most conservative estimate places the growing revenues of the carriers of the United States from the commercial travelers alone at \$484,000,000 annually."

I have two statements, one on total railway operating revenues and the other on passenger revenues, by six-months periods since January 1, 1916, which I offer in evidence.

(The statements referred to were received in evidence, marked "Carriers' Exhibit No. 45, Witness Fox," and "Carriers' Exhibit No. 49, Witness Fox," and are side pages 297 and 298 hereof.)

Cross-examination:

290 In my statement regarding mileage ticket discounts in the

Central West, I did not mean to imply that there had not been discounts prior to the 2-cents-a-mile laws. Prior to those laws in Central Passenger Association territory, to take that as an example, a ticket was sold initially at \$30 (the full-fare basis) with a \$10 refund, making a net rate of \$20, or a discount of one-third, and that book was good interstate and intrastate at a net cost to the traveler of 2 cents a mile. After the laws were enacted the book was not good for passage at a reduction from the intrastate 2-cent fare. At a later time the same ticket was sold for \$25 with a \$5 refund, and just prior to Federal control at \$25 with a \$2.50 refund.

In the earlier days books were quite generally issued in different regions of the country at a discount of one-third.

When mileage or scrip books were issued they were good for one year. Two thousand miles was a common denomination in some territories, one thousand miles in others, and five thousand miles in others. In the West they had a five thousand-mile scrip book, and in Louisiana and Texas they had a \$60 book. They had a \$30 book locally within each one of those States. There was a 2,000-mile book in Western Passenger Association territory. The 1,000-mile book was used more largely in the eastern and southern regions.

During the past year the carriers have voluntarily issued a considerable number of excursion tickets at reduced fares, some of which

were one-third reduction from the standard fares. There was a great range in the reduction. Some were 10 per cent. This was done to stimulate travel.

291 WILLIAM P. ROSE, recalled by respondents, testified further:

In response to the request for it I have tried to ascertain some road on which we could show the amount of passenger travel before and after the beginning of the use of a mileage ticket at a reduced rate, and I have conferred with other passenger men on the matter, but we are unable to furnish such information because the use of such mileage tickets began so long ago on all roads in the country that we can not now produce any data as to the travel before and after.

In 1915 the Southern Railway Company had a total of 1,515 employees in the passenger accounting department and the pay roll for the year was \$80,742.32. Of that number 27 were engaged in the audit of the mileage and scrip tickets and the pay roll on that work was \$12,416.75. The percentage of the clerks to the total was 17.88 and the percentage of the cost was 15.38. In 1916 there were 155 employees in the passenger accounting department and the pay roll for the year was \$86,361.82. Of that number 28 were engaged in the audit of the mileage and scrip tickets and the pay roll on that work was \$12,400.83. Percentage as to clerks 16.97; percentage as to cost 14.36. In 1917 there were 173 employees in the passenger accounting department and the pay roll for the year was \$104,627.97. Of that number 29 were engaged in the audit of the mileage and scrip tickets and the pay roll on that work was \$12,589.32. Percentage for

292 clerks 16.76; percentage of cost 18.63. There is no substantial increase of mileage clerks even though there is a substantial increase of passenger business. The average pay per month to employees engaged in the audit of the mileage and scrip tickets was \$38.32 in 1915, \$36.91 in 1916, \$36.18 in 1917. Most of them were young women. The supervisor received a higher salary, but it is included in the computation of the averages just given.

I would not like to say that this situation was fairly indicative of the situation that would exist with other carriers who used mileage books, but I am perfectly satisfied that it would not be less work and that possibly it might be more.

The averages for the total were: 1915, \$44.56; 1916, \$43.62; 1917, \$50.40. For the month of September, 1922, the average for everybody was \$111.60. Now if we had to employ 29 clerks to-day I would say it would take \$2,900 to do it, and they would not be as good as some I got back there for \$38.32. We are short on efficiency these days. I have no reason to believe that if the Southern Railway started this again it would take fewer employees than formerly. It might take more. If we had to employ 29 people to-day we would have to pay them not less than \$2,500 or \$2,900, somewhere around \$100 a month. You can not get a girl for \$30 any more. She wants as much as a man gets.

If you should sell 100 card tickets, say from Washington, to 100 destinations on the issuing road, each and every one of those 293 100 tickets is exactly the same size. You detach 100 pieces of mileage to those 100 destinations and every one of them will be a different size. They might be anywhere from an inch to seven feet long. Many times they are as much as six or seven feet long. There has been a great deal of thought spent on the question of the form of coupon books with a view to making them more convenient to the traveler and more expeditiously handled by the carrier. Not only the railroads but the printers have tried to get some book from which detachments of the same size would be taken, but I do not see how it can be done. Detachments must vary according to the distance. The trouble with coupons of different values would be that they would not fit every situation. When a man first gets his book he may be able to travel to some point for which he could detach exactly enough, but pretty soon, if he traveled much, he would make some trip in which he would not have coupons to cover it exactly. The difficulties would only be accentuated by such a book containing coupons of different denominations. In listing the mileage to a foreign carrier we have to prepare a statement showing how it was listed, and it is the easiest way to show the commencing number and the closing number on the particular detachment. If we had a lot of pieces varying from 50 cents to a dollar, and a quarter and five cents it would be much more difficult to make that statement than if it were just a long list of five-cent pieces.

294 M. O. LORENZ, a witness called by the commission, testified: I am a director of the Bureau of Statistics of the Interstate Commerce Commission.

I have prepared two tabulations, one entitled "Selected items of revenue, expense, and traffic statistics—Class I steam roads, 1916-1922," and the other entitled "Freight service and passenger service operating ratios by districts, 1920 and 1921," which I offer in evidence.

(The two tabulations referred to were received in evidence, marked "Commission's Exhibit No. 50, Witness Lorenz," and are side pages 299 and 300 hereof.)

Whereupon the hearing in the main docket, Docket No. 14104, was concluded, and the commission proceeded to the further consideration of Docket No. 14104, Sub-No. 1, which proceedings are contained in that docket.

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JULY 1922
PRELIMINARY REPORT OF REVENUES AND EXPENSES
CLASS I ROADS AND LARGE SWITCHING & TERMINAL COMPANIES

Item and District	Month of July			7 months period ended July 31		
	1922	1921	% of increase	1922	1921	% of increase
TOTAL OPERATING REVENUES:						
Eastern District (Incl. Poca. Reg.)	\$213 421 370	\$225 365 861	d 5.3	\$1 509 898 526	\$1 535 200 411	d 1.6
Southern District (Excl. Poca. Reg.)	53 063 607	54 098 833	d 1.9	400 288 494	396 791 212	d 0.9
Western District	176 698 015	183 474 993	d 3.7	1 144 344 016	1 204 980 182	d 5.0
Total - United States	443 182 992	462 939 687	d 4.3	3 054 531 036	3 136 971 805	d 2.6
TOTAL MAINTENANCE EXPENSES:						
Eastern District (Incl. Poca. Reg.)	75 332 230	79 412 474	d 5.1	539 212 230	578 314 925	d 6.8
Southern District (Excl. Poca. Reg.)	18 876 233	21 065 282	d 10.4	136 957 586	153 216 422	d 10.6
Western District	49 969 736	59 977 070	d 16.7	405 112 239	439 970 283	d 7.9
Total - United States	144 178 199	160 454 826	d 10.1	1 081 282 055	1 171 501 630	d 7.7
TOTAL OPERATING EXPENSES:						
Eastern District (Incl. Poca. Reg.)	173 585 843	179 714 172	d 3.4	1 199 960 281	1 347 701 650	d 11.0
Southern District (Excl. Poca. Reg.)	43 134 458	46 454 983	d 7.1	312 377 412	356 261 449	d 12.3
Western District	124 005 509	136 587 110	d 9.2	907 254 692	1 019 946 404	d 11.0
Total - United States	340 725 810	362 756 265	d 6.1	2 419 602 385	2 723 909 503	d 11.2
NET RAILWAY OPERATING INCOME:						
Eastern District (Incl. Poca. Reg.)	24 165 406	31 054 374	d 22.2	211 988 243	98 308 999	115.6
Southern District (Excl. Poca. Reg.)	6 479 120	4 703 022	37.8	61 007 234	18 316 189	233.1
Western District	38 594 506	33 566 805	15.0	145 275 616	98 088 284	48.1
Total - United States	69 239 032	69 324 201	d 0.1	418 271 093	214 713 472	94.8
RATE EARNED - ANNUAL BASIS:						
Eastern District (Incl. Poca. Reg.)	2.85	3.67	-	4.76	2.21	-
Southern District (Excl. Poca. Reg.)	4.38	3.18	-	5.04	1.51	-
Western District	5.36	4.66	-	3.70	2.50	-
Total - United States	4.04	4.04	-	4.36	2.24	-

Average mileage Eastern District 64,595; Southern District 38,395; Western District 132,231; United States 235,221.

d Denotes decrease.

NOTE: "Rate earned - annual basis" is based on the tentative valuation as fixed by the Interstate Commerce Commission, plus additions and betterments to Sept. 30, 1921. The rate is computed after taking into account seasonal fluctuations in traffic and earnings.

Bureau of Railway Economics
 Washington, D. C. Sept. 8, 1922.

If you should sell 100 card tickets, say from Washington, to 100 destinations on the issuing road, each --

	valuation	income	per cent	per cent
<u>1 MONTH - JANUARY, 1922:</u>				
Eastern District (Incl. Poca. Reg.)	\$28 417 295	\$19 189 616	\$9 227 679	4.05
Southern District (Excl. Poca. Reg.)	9 960 470	4 514 387	5 446 083	2.72
Western District	27 311 123	5 772 419	21 538 704	1.27
Total - United States	65 688 888	29 476 422	36 212 466	2.69
<u>2 MONTHS - JAN. 1, 1922 TO FEB. 28, 1922:</u>				
Eastern District (Incl. Poca. Reg.)	53 119 313	48 763 293	4 356 020	5.51
Southern District (Excl. Poca. Reg.)	20 593 944	11 563 532	9 030 412	3.37
Western District	54 622 246	16 977 886	37 644 360	1.86
Total - United States	128 335 503	77 304 711	51 030 792	3.61
<u>3 MONTHS - JAN. 1, 1922 TO MARCH 31, 1922:</u>				
Eastern District (Incl. Poca. Reg.)	89 936 846	96 669 107		6.45
Southern District (Excl. Poca. Reg.)	33 919 437	22 798 487	11 120 950	4.03
Western District	90 374 989	41 531 835	48 843 154	2.76
Total - United States	214 231 272	160 999 429	53 231 843	4.51
<u>4 MONTHS - JAN. 1, 1922 TO APRIL 30, 1922:</u>				
Eastern District (Incl. Poca. Reg.)	126 026 077	123 310 284	2 715 793	5.87
Southern District (Excl. Poca. Reg.)	44 283 709	32 514 142	11 769 567	4.41
Western District	120 665 508	55 468 967	65 196 541	2.76
Total - United States	290 975 294	211 293 393	79 681 901	4.36
<u>5 MONTHS - JAN. 1, 1922 TO MAY 31, 1922:</u>				
Eastern District (Incl. Poca. Reg.)	167 738 092	155 047 671	12 690 421	5.55
Southern District (Excl. Poca. Reg.)	54 513 380	43 818 870	10 694 510	4.82
Western District	153 935 422	74 392 470	79 542 952	2.90
Total - United States	376 186 894	273 259 011	102 927 883	4.36
<u>6 MONTHS - JAN. 1, 1922 TO JUNE 30, 1922:</u>				
Eastern District (Incl. Poca. Reg.)	216 252 098	187 883 726	28 368 372	5.21
Southern District (Excl. Poca. Reg.)	63 800 845	54 528 110	9 272 735	5.13
Western District	192 170 995	106 681 109	85 489 886	3.33
Total - United States	472 223 938	349 092 945	123 130 993	4.44
<u>7 MONTHS - JAN. 1, 1922 TO JULY 31, 1922:</u>				
Eastern District (Incl. Poca. Reg.)	267 024 776	211 988 243	55 036 533	4.76
Southern District (Excl. Poca. Reg.)	72 684 507	61 007 235	11 677 272	5.04
Western District	235 372 227	145 275 616	90 096 611	3.70
Total - United States	575 081 510	418 271 094	156 810 416	4.36

NOTE: "Six per cent on tentative valuation" is computed on the tentative valuation made by the Interstate Commerce Commission in Ex Parte 74 for rate making purposes, adjusted by the Bureau of Railway Economics to apply to railways of Class I, and to include the net amount of additions from January 1, 1920 to September 30, 1921. This tentative valuation has not been accepted by the railways as representing the true value of railway property devoted to the public service. The six per cent is allocated to the several months on the basis of monthly variations in railway operating income, so as to reflect seasonal fluctuations in traffic and earnings. This monthly distribution follows the actual average results of the five-year period ended December 31, 1916.

Bureau of Railway Economics

Washington, D. C. Sept. 20, 1922.

1. The first part of the document is a list of names and addresses, which are arranged in two columns. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list includes names such as "John Doe", "Jane Smith", and "Robert Brown", along with their respective addresses in various cities and states.

2. The second part of the document is a series of numbered entries, each consisting of a name, an address, and a brief description of the item or service being provided. The entries are numbered from 1 to 10, and the descriptions are written in a cursive script. The items include various types of clothing, furniture, and household goods.

3. The third part of the document is a list of names and addresses, similar to the first part, but arranged in a different order. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list includes names such as "John Doe", "Jane Smith", and "Robert Brown", along with their respective addresses in various cities and states.

4. The fourth part of the document is a series of numbered entries, each consisting of a name, an address, and a brief description of the item or service being provided. The entries are numbered from 1 to 10, and the descriptions are written in a cursive script. The items include various types of clothing, furniture, and household goods.

5. The fifth part of the document is a list of names and addresses, similar to the first part, but arranged in a different order. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list includes names such as "John Doe", "Jane Smith", and "Robert Brown", along with their respective addresses in various cities and states.

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

PASSENGER REVENUES - CLASS I RAILWAYS

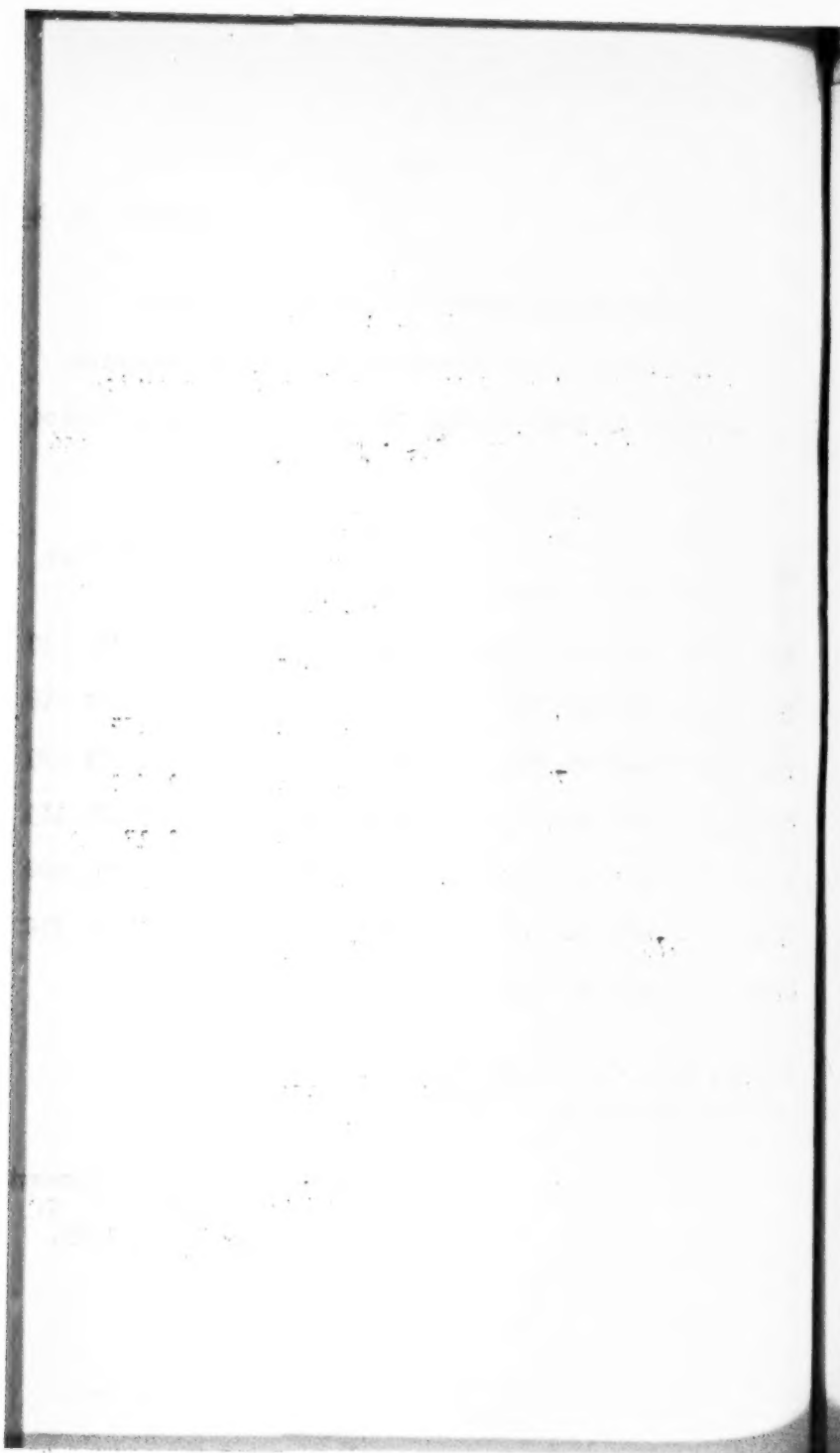
Including Large Switching & Terminal Companies

January 1, 1916 to June 30, 1922 in 6 Months Period

Year	First 6 months	Second 6 months	Year
	Jan. - June	July - Dec.	
1916	315 420 520	392 600 463	708 020 983
1917	360 620 773	466 595 801	827 216 574
1918	448 208 768	583 020 498	1 031 229 266
1919	542 809 826	635 310 128	1 178 119 954
1920	567 010 780	721 797 379	1 288 808 159
1921	575 142 585	578 609 417	1 153 752 002
1922	502 851 949		

SOURCE: From Interstate Commerce Commission
monthly summaries of Revenues & Expenses.

Bureau of Railway Economics
Washington, D. C.
September, 1922.



Item

1.	Railway operating revenues, total	\$
2.	Passenger revenue	
3.	Railway operating expenses	
4.	Operating ratio-total (%)	
5.	Freight (%)	
6.	Passenger and allied service (%)	
7.	Net railway operating income	
8.	Return on book value (%)	
9.	Amount of book value used for item 8	
10.	Valuation in increased rates 1920, adjusted for Class I Roads	
10A.	Return on value in item 10.....	
11.	Passenger train miles, excl. mixed	
12.	Pass. train loco. miles excl. mixed	
13.	Pass. train car miles, total	
14.	Passenger	
15.	Sleeping, parlor and observation	
16.	Dining	
17.	Other	
18.	No. of revenue passengers carried	
19.	No. of revenue passenger miles	
20.	Passengers per train	
21.	Passengers per car	
22.	Average journey per passenger	
23.	Revenue per passenger per road	\$
24.	Revenue per passenger mile (cts.)	
25.	Commutation passengers in item 18	
26.	Commutation pass. miles in item 19	
27.	Commutation pass. revenue in item 2	
.	Other than commutation traffic:	
28.	Passengers	
29.	Passenger miles	
30.	Average journey	
31.	Revenue per pass. mile (cts.)	
32.	Amount of surcharge in item 2	

Selected Items of Revenue, Expense and Traffic Statistics - Class I Steam Roads, 1916 - 1922.
(Including Switching and Terminal Companies in items 1-10 Incl.)

Year ended December 31.						6 months ended June 30, 1921	6 m en Jun
1916	1917	1918	1919	1920	1921		
\$ 3,625,252,371	\$ 4,050,463,579	\$ 4,926,593,957	\$ 5,184,064,221	\$ 6,225,417,245	\$ 5,563,232,215	\$ 2,676,181,270	\$ 2,611,
707,757,469	827,216,574	1,032,671,429	1,180,010,266	1,287,423,443	1,153,752,002	574,939,925	502,
2,376,372,042	2,858,212,210	4,017,209,501	4,419,441,949	5,830,326,686	4,597,479,241	2,363,343,960	2,078,
65.55	70.57	81.54	85.25	93.65	82.64	88.31	7
*	*	*	*	98.06	81.79	*	
1,051,543,860	974,778,937	693,111,170	516,290,090	58,151,863	614,810,531	145,485,019	349,
...	...	...	2.70	0.29	3.06	...	
...	...	...	19,090,115,837	19,694,622,226	20,073,336,550**	...	
...	...	...	17,994,000,000	18,599,000,000	...	...
...	...	...	2.87	0.31	...	...
576,094,139	575,500,297	529,443,568	539,803,363	560,498,342	554,799,797	# 271,492,000	# 265,
584,468,866	585,734,762	538,653,099	550,591,102	572,852,229	561,514,778	# 283,249,000	# 277,
3,359,598,615	3,438,682,449	3,239,548,837	3,413,342,601	3,578,158,498	3,469,039,193	# 1,705,041,000	# 1,667,
1,378,055,293	1,387,285,845	1,349,001,171	1,388,353,268	1,441,948,898	1,372,557,168	# 664,025,145	# 629,
800,097,475	847,720,522	736,102,889	829,153,007	881,040,639	862,035,235	# 424,867,798	# 430,
123,179,507	125,639,425	107,360,494	109,797,564	121,101,953	118,541,258	# 59,468,061	# 59,
1,058,266,340	1,078,036,657	1,047,084,283	1,086,038,762	1,134,067,008	1,115,905,532	# 556,681,005	# 547,
1,005,954,777	1,066,638,474	1,084,997,896	1,177,820,454	1,234,762,043	1,034,496,329	527,041,000	475,
34,585,952,026	39,476,858,549	42,676,579,199	46,358,303,740	46,848,667,987	37,312,585,966	18,382,451,000	16,487,
57	65	76	82	80	67	66	
16	17	20	21	20	16	16	
34.38	37.01	39.33	39.36	37.94	36.07	34.88	3
0.702	0.773	0.949	0.999	1.042	1.113	1.090	
2.042	2.090	2.414	2.540	2.747	3.086	3.127	
...	
...	
...	...	...	...	...	...	...	3,
...	...	...	...	...	...	...	\$33,
...	
...	...	...	...	...	...	...	13,
...	...	...	...	...	...	...	5,
...	...	...	...	\$ 12,014,911	\$ 32,601,960	\$ 16,023,105	\$ 14,

* Not compiled

** Preliminary figure

Including a proportion of mixed train service

Expense and Traffic Statistics - Class I Steam Roads, 1916 - 1922.
(Switching and Terminal Companies in items 1-10 Incl.)

ended December 31.						6 months ended June 30, 1921	6 months ended June 30, 1922
1918	1919	1920	1921				
\$ 593,957	\$ 5,184,064,221	\$ 6,225,417,245	\$ 5,563,232,215	\$ 2,676,181,270	\$ 2,611,125,035		
671,429	1,180,010,266	1,287,423,443	1,153,752,002	574,939,925	502,851,949		
209,501	4,419,441,949	5,830,326,686	4,597,479,241	2,363,343,960	2,072,672,589		
51.54	85.25	93.65	82.64	88.31	79.61		
*	*	98.06	81.79	*	*		
*	*	84.74	85.24	*	*		
111,170	516,290,090	58,151,863	614,810,531	145,485,019	349,092,945		
...	2.70	0.29	3.06	...	...
...	19,090,115,837	19,694,622,226	20,073,336,550**	...	...
...	17,994,000,000	18,599,000,000	...	...	...
...	2.87	0.31	...	...	...
443,568	539,803,363	560,498,342	554,799,797	# 271,492,000	# 265,395,000		
653,099	550,591,102	572,852,229	561,514,778	# 283,249,000	# 277,250,000		
548,837	3,413,342,601	3,578,158,498	3,469,039,193	#1,705,041,000	#1,667,077,000		
001,171	1,388,353,268	1,441,948,898	1,372,557,168	# 664,025,145	# 629,820,144		
102,889	829,153,007	881,040,639	862,035,235	# 424,867,798	# 430,578,861		
360,494	109,797,564	121,101,953	118,541,258	# 59,468,061	# 59,429,589		
084,283	1,086,038,762	1,134,067,008	1,115,905,532	# 556,681,005	# 547,246,537		
997,896	1,177,820,454	1,234,762,043	1,034,496,329	527,041,000	475,015,000		
579,199	46,358,303,740	46,848,667,987	37,312,585,966	18,382,451,000	16,487,117,000		
76	82	80	67	66	60		
20	21	20	16	16	15		
39.33	39.36	37.94	36.07	34.88	34.71		
0.949	0.999	1.042	1.113	1.090	1.052		
2.414	2.540	2.747	3.086	3.127	3.049		
...	...	...	...	...	213,375		
...	...	...	...	...	3,004,182		
...	...	...	...	...	\$33,373,645		
...	...	...	...	...	261,641		
...	...	...	...	...	13,482,935		
...	...	...	...	...	51,53		
...	...	...	...	...	3.481		
...	...	\$ 12,014,911	\$ 32,601,960	\$ 16,023,105	\$ 14,947,096		

Remarks

The purpose of this statement is to show the trend of railroad Earnings and Expenses as a whole, and more particularly the trend of passenger traffic in recent years. As the statistics for 1922 are available for only a part of the year, a column for the same part of 1921 is also included for comparison. Thus, the statement in items 18 and 19 shows a decline in passenger traffic in the first half of 1922 as compared with the same period in 1921 and the year 1921 as a whole fell below the year 1920 in the same respect.

The separation of commutation traffic from other passenger traffic was only recently begun.

of mixed train service

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EXHIBIT NO. 5

Freight service and passenger service opera

Item.	Eastern District.		Southern District.
	1921	1920	1921
	\$	\$	\$
Freight service revenues	1,790,814,157	2,002,951,891	661,797,467
Passenger and allied revenues	669,976,494	744,431,387	215,363,043
Total operating revenues	2,460,790,651	2,747,383,278	877,160,510
Freight service expenses	1,518,050,545	2,069,008,756	554,512,678
Passenger and allied service expenses	564,533,357	661,063,437	185,711,272
Total operating expenses	2,082,583,902	2,730,072,193	740,223,950
Operating ratio:			
Freight service	84.77	103.30	83.79
Passenger and allied service	84.26	83.80	86.23

Interstate Commerce Commission,
Bureau of Statistics.
September 28, 1922.

EXHIBIT NO. 50, page 2

Passenger service operating ratios by districts, 1920 and 1921.

22391.

	Southern District.		Western District.		United States.	
	1921	1920	1921	1920	1921	1920
	\$	\$	\$	\$	\$	\$
.891	661,797,467	720,680,654	1,596,144,392	1,746,896,761	4,048,756,016	4,470,529,306
.387	215,363,043	256,150,588	582,460,902	707,009,697	1,467,800,439	1,707,591,672
.278	877,160,510	976,831,242	2,178,605,294	2,453,906,458	5,516,556,455	6,178,120,978
.756	554,512,678	702,434,500	1,238,916,298	1,612,231,640	3,311,479,521	4,383,674,896
.437	185,711,272	210,272,681	500,944,152	575,609,478	1,251,188,781	1,446,945,596
.193	740,223,950	912,707,181	1,739,860,450	2,187,841,118	4,562,668,302	5,830,620,492
3.30	83.79	97.47	77.62	92.29	81.79	98.06
8.80	86.23	82.09	86.00	81.41	85.24	84.74

301 [Title omitted.]

In United States District Court.

Stipulation as to evidence for record on appeal.

Filed July 26, 1923.

In the above-entitled cause it is stipulated that an order may be made approving the statement of evidence before the Interstate Commerce Commission prepared by the appellants and providing that the transcript on appeal shall contain the portions of the record stated in the præcipes filed by the parties with the exception that it shall contain said statement of evidence in place of the certified copy of record before the Interstate Commerce Commission.

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By ESSEX S. ABBOTT,

United States Attorney, District of Massachusetts.

BLACKBURN ESTERLINE,

By ESSEX S. ABBOTT,

Assistant to the Solicitor General.

P. J. FARRELL,

By WM. B. HUNTER,

Solicitor for Interstate Commerce Commission.

HOKE SMITH,

SAMUEL BLUMBERG,

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JAMES N. CLARK,

Solicitors for National Council of Traveling

Salesmen's Associations et al.

CHAS. F. CHOATE, Jr.,

JAMES GARFIELD,

Solicitors for Appellees.

302

In United States District Court.

Citation and service of the National Council of Traveling Salesmen's Associations et al.

UNITED STATES OF AMERICA, ss:

The President of the United States to the New York Central Railroad Company; Atlantic City Railroad Company; Atlantic & St. Lawrence Railroad Company; Baltimore, Chesapeake & Atlantic Railway Company; Bangor & Aroostook Railroad Company; Boston & Maine Railroad; Buffalo, Rochester & Pittsburgh Railway Company; Central New England Railway Company; The Central Railroad Company of New Jersey; Central Vermont Railway Company; The Chicago & Erie Railroad Company; The Chesapeake & Ohio Railway Company; Chicago, Detroit & Canada Grand Trunk Junction Railroad Company; The Cincinnati, Indianapolis & Western Railroad Company; The Cincinnati Northern Railroad Company; The Cincinnati, Lebanon & Northern Railway Company;

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; The Delaware & Hudson Company; The Delaware, Lackawanna & Western Railroad Company; Detroit, Grand Haven & Milwaukee Railway Company; Detroit & Toledo Shore Line Railroad Company; Erie Railroad Company; Grand Rapids & Indiana Railway Company; Grand Trunk Western Railway Company; The Lake Erie & Western Railroad Company; Lehigh Valley Railroad Company; The Long Island Railroad Company; Maine Central Railroad Company; Maryland, Delaware & Virginia Railway Company; The Michigan Central Railroad Company; The Monongahela Railway Company; New Jersey & New York Railroad Company; The New York, Chicago & St. Louis Railroad Company; New York Connecting Railroad Company; The New York, New Haven & Hartford Railroad Company; New York, Ontario & Western Railway Company; New York, Susquehanna & Western Railroad Company; The Pennsylvania Railroad Company; The Philadelphia & Reading Railway Company; The Pittsburgh & Lake Erie Railroad Company; The Pittsburgh, Shawmut & Northern Railroad Company and Henry S. Hastings, receiver; Port Reading Railroad Company; Richmond, Fredericksburg & Potomac Railroad Company; The Rutland Railroad Company; Toledo, St. Louis & Western Railroad Company; West Jersey & Seashore Railroad Company; Western Maryland Railway Company, and The Wheeling & Lake Erie Railway Company, and Baltimore & Ohio Railroad Company; Wabash Railway Company; Pere Marquette Railway Company; and Chicago, Indianapolis & Louisville Railway Company, greeting:

303 You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Washington, District of Columbia, within thirty (30) days from the date hereof, pursuant to an appeal duly filed in the clerk's office of the United States District Court for the District of Massachusetts, wherein National Council of Traveling Salesmen's Associations et al. and Garment Salesmen's Association, Inc., are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants as in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Julian W. Mack, United States circuit judge, the Honorable George F. Morris and the Honorable Elisha H. Brewster, United States district judges, this fifteenth day of May, A. D. 1923.

JULIAN W. MACK,
United States Circuit Judge.
GEORGE F. MORRIS,
ELISHA H. BREWSTER,
United States District Judges.

Service of the foregoing citation and the receipt of a copy thereof is hereby acknowledged this 15th day of May, 1923.

CHAR. F. CHOATE, Jr.,
Solicitor for All Appellees.

Citation and service of the United States of America and Interstate Commerce Commission.

UNITED STATES OF AMERICA, ss:

The President of the United States to The New York Central Railroad Company; Atlantic City Railroad Company; Atlantic & St. Lawrence Railroad Company; Baltimore, Chesapeake & Atlantic Railway Company; Bangor & Aroostock Railroad Company; Boston & Maine Railroad; Buffalo, Rochester & Pittsburgh Railway Company; Central New England Railway Company; The Central Railroad Company of New Jersey; Central Vermont Railway Company; The Chicago & Erie Railroad Company; The Chesapeake & Ohio Railway Company; Chicago, Detroit & Canada Grand Trunk Junction Railroad Company; The Cincinnati, Indianapolis & Western Railroad Company; The Cincinnati Northern Railroad Company; The Cincinnati, Lebanon & Northern Railway Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; The Delaware & Hudson Company; The Delaware, Lackawanna & Western Railroad Company; Detroit, Grand Haven & Milwaukee Railway Company; Detroit & Toledo Shore Line Railroad Company; Erie Railroad Company; Grand Rapids & Indiana Railway Company; Grand Trunk Western Railway Company; The Lake Erie & Western Railroad Company; Lehigh Valley Railroad Company; The Long Island Railroad Company; Maine Central Railroad Company; Maryland, Delaware & Virginia Railway Company; The Michigan Central Railroad Company; The Monongahela Railway Company; New Jersey & New York Railroad Company; The New York, Chicago & St. Louis Railroad Company; New York Connecting Railroad Company; The New York, New Haven & Hartford Railroad Company; New York, Ontario & Western Railway Company; New York, Susquehanna & Western Railroad Company; The Pennsylvania Railroad Company; The Philadelphia & Reading Railway Company; The Pittsburgh & Lake Erie Railroad Company; The Pittsburgh, Shawmut & Northern Railroad Company and Henry S. Hastings, receiver; Port Reading Railroad Company; Richmond, Fredericksburg & Potomac Railroad Company; The Rutland Railroad Company; Toledo, St. Louis & Western Railroad Company; West Jersey & Seashore Railroad Company; Western Maryland Railway Company, and The Wheeling & Lake Erie Railway Company, and Baltimore & Ohio Railroad Company; Wabash Railway Company, Pere Marquette Railway Company, and Chicago, Indianapolis & Louisville Railway Company, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Wash-

ington, District of Columbia, within thirty (30) days from the date hereof, pursuant to an appeal duly filed in the clerk's office of the United States District Court for the District of Massachusetts, wherein United States of America and Interstate Commerce Commission are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the appellants as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Julian W. Mack, United States circuit judge, the Honorable George F. Morris and the Honorable Elisha H. Brewster, United States district judges, this fifteenth day of May, A. D. 1923.

JULIAN W. MACK,
United States Circuit Judge.
GEORGE F. MORRIS,
ELISHA H. BREWSTER,
United States District Judges.

Service of the foregoing citation and the receipt of a copy thereof is hereby acknowledged this 15th day of May, 1923.

CHAS. F. CHOATE, Jr.,
Solicitor for All Appellees.

308

In United States District Court.

Clerk's certificate.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, James S. Allen, clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of record on appeal, including true copies of such proofs, entries, and papers on file as have been designated by precepts, in the cause in equity entitled No. 1808, The New York Central Railroad Company et al., petitioners, v. The United States of America et al., respondents, in said District Court determined, together with the original citations and the acknowledgments of service thereon.

I further certify that the order of court annexed hereto is a true copy of the order entered upon the stipulation of parties, filed July 26, 1923, relative to the statement of evidence before the Interstate Commerce Commission to be incorporated in the record on appeal.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said district, this twenty-eighth day of July, A. D. 1923.

[SEAL.]

JAMES S. ALLEN, *Clerk.*

307 In the District Court of the United States, District of
Massachusetts.

[Title omitted.]

Order settling statement of evidence.

July 26, 1923.

Upon the stipulation of the parties, it is

Ordered, That the statement of evidence before the Interstate Commerce Commission prepared by the appellants be, and the same hereby is, approved, and that the transcript on appeal shall contain the portions of the record stated in the præcipes filed by the parties, with the exception that it shall contain said statement of evidence in place of the certified copy of record before the Interstate Commerce Commission.

ELISHA H. BREWSTER,
U. S. District Judge.

GEORGE F. MORRIS,
U. S. District Judge.

308 District Court of the United States, District of Massachusetts.

[Title omitted.]

Order enlarging time.

May 15, 1923.

For good cause shown, it is ordered that the time within which to prepare the transcripts of record and docket the appeals in the Supreme Court of the United States be, and the same is hereby, enlarged to and including August first, 1923.

J. W. MACK,
United States Circuit Judge.

GEORGE F. MORRIS,
ELISHA H. BREWSTER,
United States District Judges.

(Indorsement on cover:) File No. 29,779. Massachusetts D. C., U. S. Term No. 469. The United States of America, The Interstate Commerce Commission, National Council of Traveling Salesmen's Associations, et al., appellants, vs. The New York Central Railroad Company, Atlantic City Railroad Company, Atlantic & St. Lawrence Railroad Company, et al. Filed July 31st, 1923. File No. 29,779.

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In the Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 469.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, NATIONAL COUNCIL OF
TRAVELING SALESMEN'S ASSOCIATIONS, ET AL.,
APPELLANTS,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,
ATLANTIC CITY RAILROAD COMPANY, ATLANTIC &
ST. LAWRENCE RAILROAD COMPANY, ET AL.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF MASSACHUSETTS.*

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The question is whether an order of the Interstate Commerce Commission directing Class I carriers (with certain exceptions) to issue and put on sale, with appropriate regulations, interchangeable scrip or coupon tickets, at fares 20 per cent less than the

standard passenger fares (or \$90 face value for \$72) is valid.

The order was entered on specific evidence adduced by the parties before the Commission in pursuance of the statute (Tr. 103-151). The practice of issuing mileage tickets had prevailed for more than 50 years on the part of the carriers with the sanction of statutes and cases, Federal and State. The practice has been universally acquiesced in without question of its legality by the travelling public in both England and America.

The District Court (Circuit Judge Mack and District Judges Morris and Brewster) entered a final decree annulling the order (Tr. 90). Laying hold of the following language of the Commission (which is set forth in the petition, Par. XIV, Tr. 8), "The spirit and the apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare, which would be just and reasonable because it would be sold in such quantities as to stimulate travel and thereby increase net revenue (Tr. 27) * * *" the District Court held "it is clear" the Commission proceeded on the assumption (Tr. 91) "that the spirit and theory of the Congressional amendment required them to order the scrip coupons to be issued at reduced rates * * *."

Apparently because of those words in the report, and that only, the order was annulled, as the learned District Court continues (Tr. 91): "There is no finding in the record that would indicate that the Com-

mission, if it had exercised an independent judgment apart from what it conceived to be the plain spirit and theory of the amendment, would have ordered the scrip coupons to be issued at reduced rates."

For a case nation-wide in its scope and of such great public importance, that would seem a narrow and technical view on which to overthrow the order. The District Court assumed that the Commission ignored its own order of August 23, 1922, fixing a hearing (Tr. 16, 17) on the question, *inter alia*, "What rate or rates shall be established as *just and reasonable* for each or either form of ticket?"; that the Commission shut its eyes and ears to the voluminous testimony and exhibits before it which have been abstracted for the present record; that the language of the Commission (Tr. 28) "In addition to the obvious spirit of the law, *the record warrants the view* that a coupon ticket at a reasonably reduced fare should be established, at least for an experimental period," and "we further find that the rates resulting from that reduction will be *just and reasonable* for this class of travel," does not mean what it says.

There is no charge in the petition that the order is without substantial evidence to support it. The hearing before the Commission on the questions it propounded is not only fully alleged but its adequacy is not questioned. (Tr. 4, 5.) The very finding "that the rates resulting from that reduction will be just and reasonable for that class of travel" is set out *in haec verba*.

For these reasons the Government filed a motion to dismiss (Tr. 67) and elected to stand (Tr. 90, 91). The decree of permanent injunction hangs by a slender thread. The action of the learned District Court in annulling the order is fully covered by the assignment of errors.

II.

THE STATUTE.

Section 22 of the Act to Regulate Commerce, approved February 4, 1887 (24 Stat. 379, 387), was first amended by the act of March 2, 1889, so as to read (25 Stat. 855, 862):

That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards

of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

In that form it stood unchanged until the amendment of August 18, 1922 (42 Stat. 827):

An Act To amend section 22 of the Interstate Commerce Act, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 22 of the Interstate Commerce Act, as amended, is amended by inserting "(1)" after the section number at the beginning of such section and by adding to the section two new paragraphs to read as follows:

"(2) The commission is directed to require, after notice and hearing, each carrier by rail, subject to this Act, to issue at such offices as may be prescribed by the commission interchangeable mileage or scrip coupon tickets at just and reasonable rates, good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The commission may in its discretion exempt from the provisions of this amendatory Act either in

whole or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made. Such tickets may be required to be issued in such denominations as the commission may prescribe. Before making any order requiring the issuance of any such tickets the commission shall make and publish such reasonable rules and regulations for their issuance and use as in its judgment the public interest demands; and especially it shall prescribe whether such tickets are transferable or nontransferable, and if the latter, what identification may be required; and especially also to what baggage privileges the lawful holders of such tickets are entitled.

“(3) Any carrier which, through the act of any agent or employee, willfully refuses to issue or accept any such ticket demanded or presented under the lawful requirements of this Act, or willfully refuses to conform to the rules and regulations lawfully made and published by the commission hereunder, or any person who shall willfully offer for sale or carriage any such ticket contrary to the said rules and regulations shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not to exceed \$1,000.”

III.

THE HISTORY OF THE TIMES UNDER WHICH
CONGRESS ACTED.

(a) REFERENCE TO COMMITTEE REPORTS AND DEBATES OF SENATORS
AND REPRESENTATIVES IS PERMISSIBLE.

Stafford v. Wallace, 258 U. S. 495, 513, Mr. Chief
Justice Taft:

It was for Congress to decide from its general information and from such special evidence as was brought before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted. (*Chicago Board of Trade v. United States*, 246 U. S. 231, 238; *Danciger v. Cooley*, 248 U. S. 319, 322.)

As a means of ascertaining the "history of the times" or "the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted," the reports and debates may properly be resorted to. (*United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 316, 320; *Standard Oil Co. v. United States*, 221 U. S. 1, 50. See also *Church of Holy Trinity v. United States*, 143 U. S. 457, 463; *Chicago Board of Trade v. United States*, 246 U. S. 231, 238.

(b) PROCEEDINGS IN THE SENATE.

On June 27, 1921, the Subcommittee of the Senate Committee on Interstate Commerce conducted its

hearing on S. 331, "A bill to amend section 22 of the Interstate Commerce Act by permitting the issuance of interchangeable mileage tickets on railroads, and for other purposes."

Numerous bills had been introduced (S. 819, 331, 848, 1085, 1249, 1318, 1374, and 1447) providing for the issuance of mileage tickets or books by the carriers at reduced rates. (Mileage Book Hearings, p. 3; Senator Robinson, App. A,¹ p. 58.)

In January, 1922, the proposed amendment was vigorously debated in the Senate, principally on the question whether the act should specifically fix the fare at 2½ cents per mile or whether the reduced amount should be left to the Commission for determination after hearing. The Senate forces who favored then and there fixing the reduction were led by Senator Robinson. Senators who favored the other course (which prevailed) were led by Senators Cummins and Pomerene, thus:

Senator Robinson (Cong. Rec., vol. 62, pt. 2, p. 1332):

They (the Commission) have the power to promulgate the general rate, which is the same thing in the end, if they choose to exercise it. The difficulty about the matter is this: The commission are overburdened with duties. They are performing very important and very difficult functions. They have been unable to

¹ Appendix A consists of Statements of Senator Robinson, p. 58; Senator Cummins, pp. 67, 68; Senator Pomerene, p. 84; Senator Capper, p. 82; Senator Trammell, pp. 80, 83; Senator Watson of Indiana, pp. 85, 86; Senator King, p. 84.

reach an agreement respecting this subject. Merely to authorize the commission to do something which many think they have the power already to do if they chose to exercise that power, would not be accomplishing very much. But conceding that the commission may not without legislation require the issuance of mileage books, an objection grows out of the fact that great delay will ensue if the matter is relegated to the commission. I do not believe any step Congress can take will more quickly and more vitally restore courage, enthusiasm, and interest among the people of the country in their business affairs than the passage of legislation of this character. It is not a question of general rate making, although, of course, the effect of our action here must be considered in relation to the broader and even more important question of revenues to railroads generally.

It is a comparatively simple matter. If the rate fixed in the bill, in the judgment of the Senate, is too low, if the Senate thinks that the Senator from Indiana (Mr. Watson) in preparing the bill and fixing the rate at which the mileage should be issued at $2\frac{1}{2}$ cents per mile acted unwisely and that the rate ought to be increased, we can do it. We have sufficient intelligence and information respecting the subject to wisely determine it. I think the rate is about right. The enactment of this legislation will have a wholesome effect. I do not see the slightest necessity for throwing it into the Interstate Commerce Commission, where we know there is such a division

of opinion respecting the policy involved in the legislation and probably its relation to revenue that no action is likely to result if the amendment of the Senator from Iowa is agreed to.

Senator Cummins (Cong. Rec., vol. 62, pt. 2, p. 1399):

Mr. President, I am not insisting that Congress has no power to establish freight rates or passenger rates. I agree that Congress, if it desired to do so and had sufficient information to do so, could fix every one of the millions of rates upon which transportation is now carried on. I am only saying that if it attempted to exercise that power the transportation of the United States would quickly fall into such confusion that the condition would be intolerable, and I think that the practice would not be persisted in very long. But I am only saying at the present time that if the Congress of the United States now determines that a certain class of its people shall be carried at $2\frac{1}{2}$ cents a mile, the Interstate Commerce Commission, in considering what revenue the railroads ought to receive, must take into account the reduced revenues, if they shall be reduced by the fixing of the passenger rate at $2\frac{1}{2}$ cents a mile, and adjust the freight rates accordingly, for it is fundamental that the railroad companies, if they are to be maintained, must have a revenue derived from the operation of their properties that will be sufficient to maintain them. I repeat, therefore, that if by enacting this

bill we take \$5,000,000 or \$50,000,000 or \$100,000,000 from the revenues of the railroad companies, taken as a whole, then, if the existing revenues of the railroad companies are not more than sufficient to maintain them, it will be the absolute duty of the Interstate Commerce Commission to increase freight rates in order to meet the deficit so created. That must be obvious to the most casual examiner of this subject.

* * * * *

I am not going to assert what the outcome might be so far as increased travel is concerned. That is the very thing that the Interstate Commerce Commission has been considering for more than a year, and it has considered it in the most deliberate way, after the most extensive and exhaustive hearings, and it has fixed the rates accordingly. If it believes that the passenger rates can be reduced so as to increase the net income of the railroad companies, well and good; but I would rather—and I think Congress would rather—accept the enlightened and informed judgment of the Interstate Commerce Commission upon that question than the uninformed judgment of any Senator, however earnest and however studious he may be.

* * * * *

I am not opposing this bill because I do not believe in this form of transportation; I am opposing it because I think it ought to be accomplished through the medium of the Interstate Commerce Commission rather than through direct legislation; and it ought to be

accomplished, if at all, with due regard to its effect upon the transportation of commodities in which the people are primarily interested; and it ought to be accomplished upon a reasonable and fair basis, for the discrimination has been laid by testimony offered to the commission; and that body alone, so far as the present composition of our Government is concerned, is qualified to determine at what rate mileage books of the kind described in the amendment I have proposed should be issued (p. 1405).

Senator Pomerene (Cong. Rec., vol. 62, pt. 2, p. 1332):

The objection I have to this legislation is not that I feel that the rates ought not to be reduced, because I think they should be, just as the Senator has been contending. The objection I have is to establishing the precedent of having the Congress of the United States fix rates. What I rose to say was bearing out the Senator's theory that a reduction will increase traffic. I can give the Senator a concrete illustration from my own State.

About 15 or 16 years ago the legislature of Ohio passed what was known as the Feiner law, which reduced passenger rates from 3 cents to 2 cents per mile. It was contended that that legislation would reduce the revenues of the roads. The report of the State railway commissioner for the year following showed that the revenues at a 2 cents per mile rate in that State exceeded what they were the preceding year when the rate was 3 cents.

On March 21, 1922, the House Committee conducted its hearing on S. 848, which lasted for nine days and covered very elaborately and fully the whole subject of mileage tickets, historically and otherwise. Witnesses for both the carriers and the traveling public testified.

In June, 1922, Senate Bill 848, as it passed the Senate, was vigorously and fully debated in the House, where it was passed with certain carefully prepared amendments.²

Chairman Winslow, in analyzing the bill on the floor of the House, said (Cong. Rec., vol. 62, pt. 9, p. 9714):

The Senate never intended to express any opinion on the mile price of mileage or on what might have been the original base cost of mileage or to do anything other than to give direction to the Interstate Commerce Commission to issue mileage books under regulations, and so forth. That is all any proponent of the bill asked the Senate to do. The Senate did it promptly and sent the bill to us, and after hearings we came to the conclusion that the bill in its intent might have been all right, but in its form was not sufficiently comprehensive to give the traveling public, whether commercial travelers buying transportation by wholesale or others, a likely chance to buy a mileage book, so called, or a scrip book. We

² Appendix B consists of statements of Representatives Winslow, p. 92; Fess, p. 88; Snell, p. 90; Huddleston, p. 90; Hawes, p. 98; Barkley, p. 100; Newton, p. 103; Denison, p. 107; Cooper, p. 110

cast about to see what we could do for commercial travelers and those who might buy these books. The bill gives the Interstate Commerce Commission all the authority that the Senate provided be given. It gives them more also in two particulars. If you chance to have a copy of the report on this bill you will find a statement is made that the principal changes are twofold. One of the two provisions is made for the issuance of a scrip coupon book. The second is a provision for the exemption of certain rail carriers in case the Interstate Commerce Commission shall see fit to authorize the issuance of a mileage more or less in general, but not universal, as applied to rail carriers. So our attention naturally and automatically came to the consideration of those two forms of books, * * *.

Other members of the House committee spoke at length on the bill (App. B, p. 88). Representative Huddleston, a member of the committee, vigorously opposed the bill (App. B, p. 90).

(d) **THE COMMISSION'S REPORT.**

The history of the mileage ticket as found by the Commission confirms that it was initiated and used by the carriers to advantage for many years prior to Federal Control.

The Commission found (77 I. C. C. 204; Tr. 23):

The evidence indicates that mileage tickets were primarily issued not for the purpose of stimulating passenger travel but as a means of inducing shippers to route freight over particular railroads. They were issued at fares

lower than the standard fares for the convenience of and as a concession to shippers at a time when concessions were common. They were not infrequently given to shippers free. At one time it was customary to issue annual passes to large shippers who employed traveling men. Passes were issued with the idea that they would be used by the principal officers of the shipping concern. Mileage tickets were issued chiefly to take care of the traveling men employed by shippers. Moreover, by the use of mileage tickets carriers were able to extend favors to shippers commensurate with their respective freight shipments. That could not be done with term passes as no record was kept of their use.

It later became the custom to use mileage tickets also in exchange for advertising which continued until it was declared unlawful as to interstate commerce. The interstate commerce act and its amendments made it necessary for carriers to revise their practices from time to time. Carriers say that although most of them were convinced long before Federal control that the mileage book should be abolished, it was difficult for them to do so because of competition and because the custom had become deeply rooted by the sanction of time. They stress the fact that the demand of commercial travelers for mileage tickets at rates lower than the standard fares was just as insistent when the standard fare was 2.5 and 2 cents per mile as it is to-day. For some time prior to Federal control efforts were made by carriers to restrict the use of mileage tickets

so that by the time they were taken over by the Government the use of the mileage ticket had become so circumscribed in central passenger association territory, because confined to interstate passage, as to make the sale thereof negligible. Prior to October, 1917, it had been the custom for carriers in southeastern territory to issue a mileage ticket or book good for use by any member of the firm or corporation to whom issued. At that time this form of ticket was substituted for non-transferable tickets which contained 2,000 coupons and were sold at \$45.

On June 10, 1918, the director general abolished all mileage books and established in lieu thereof for the convenience of travelers an interchangeable scrip coupon ticket of denominations of \$15, \$30, and \$90, sold at the standard fare, and good on all passenger trains operated by railroads under Federal control. At the expiration of Federal control the carriers continued the use of this form of ticket in the same denominations. This ticket, which is still in use, is interchangeable among practically all carriers by rail except electric and short-line carriers. The revenue from its sale is estimated to represent about 1 per cent of the total passenger revenue. It was originally established by the director general and was perpetuated by the carriers after Federal control, partly to relieve the congestion at ticket offices in the larger cities and partly to take the place of the mileage book and thus afford the public the convenience of boarding trains for short trips without the necessity of purchasing

a ticket at the ticket office for each trip. The commercial travelers insist that the discontinuance of mileage books by the director general was in part to discourage unnecessary travel and to divert some travel from the steam roads to other forms of transportation. To what extent the director general was influenced by a desire to increase passenger revenue is not disclosed.

Immediately prior to the time that mileage tickets were abolished by the director general they had been sold at reductions below the standard fare ranging from 10 to 20 per cent, namely, 10 per cent in New England, 10 per cent in central and trunk-line passenger association territories, 20 per cent in southeastern territory, and $16\frac{2}{3}$ per cent in southwestern territory. At an earlier period they had been sold in some parts of the country at reductions of $33\frac{1}{3}$ per cent.

The evidence with respect to the extent of the use of mileage tickets prior to Federal control tends to indicate that in some parts of the country and at certain periods not less than 20 per cent of the total passenger revenue was derived from the sale of mileage tickets, and that over some routes between particular points the revenue from mileage tickets exceeded 60 per cent of the total revenue derived from passenger traffic between such points. Carriers have never issued an interchangeable mileage ticket good for use on all railroads in all parts of the country. Mileage tickets were issued good for use over particular lines and

were interchangeable as to carriers within defined territories, sometimes including a large number of railroads.

(e) REPRESENTATIONS OF GREAT COMMERCIAL ORGANIZATIONS.

James C. Lincoln, traffic manager of Merchants Association of New York, an organization composed of over 6,000 members, embracing every line of commercial activity in New York City, including real estate, railroads, banking, and other interests, 5,000 of whom are engaged directly or indirectly in commerce, testified as follows (Tr. 154):

The commercial traveler is a regular and consistent patron of the railroads, and by reason of his vocation—that is, creating commerce, exchange of commodities between the different sections of the country—he is really the agent of the carrier as well as that of the merchant, in creating an interchange of goods between the different sections of the country, from the transportation of which the carrier secures the larger part of its revenues, the freight transportation representing revenues to the carrier that are beyond those of the passenger transportation.

It is our view that the commission should give most earnest consideration to a partial restoration, at least, of the pre-war services and charges by the establishment of an interchangeable mileage book—and, as I say, in using the term “mileage book” I am using it as covering the scrip book.

I have been asked by the Chicago Association of Commerce, its trade commissioner, to

also express their sentiments—they were unable to be present—in favor of the interchangeable mileage book. They state that without question the lower mileage rates will increase travel, as the present cost of keeping men on the road is almost prohibitive, and no unnecessary traveling is being done. They state also that the merchants located in that territory say that their selling staff would be increased if they could reduce this overhead cost of commercial travel.

(f) THE PRIOR REPORTS OF THE COMMISSION REGULATING SUCH
AND LIKE FARES.

Mileage fares and tickets:

Kurtz v. Pennsylvania Co., 16 I. C. C. 410; *Weber Club, etc., v. Oregon Short Line*, 17 I. C. C. 212; *Eschner v. Pennsylvania R. R. Co.*, 18 I. C. C. 60; *In the matter of the application and use of mileage, excursion, and commutation tickets for through transportation in connection with other lawfully established fares*, 23 I. C. C. 95; *In the matter of practices and regulations governing the issuance, sale, and exchange of mileage books*, 28 I. C. C. 318; *Interchangeable acceptance of 60-trip commutation tickets*, 61 I. C. C. 677; *National Baggage Committee v. A., T. & S. F. Ry. Co.*, 32 I. C. C. 152, see page 156; *Proposed increases in New England*, 49 I. C. C. 421.

Commutation fares and tickets:

In the matter of regulations governing sale of commutation tickets to school children, 17 I. C. C. 144; *Boyle v. Great Falls & Old Dominion R. R.*, 20 I. C. C. 232; *Moore v. New York & Long Branch R. R.*,

20 I. C. C. 557; *Commutation Rate Case*, 21 I. C. C. 428; *Supplemental Report*, 27 I. C. C. 549; *Bitzer v. Washington-Virginia Ry.*, 24 I. C. C. 255; *Virginia Highlands Association v. Washington-Virginia Ry.*, 30 I. C. C. 592; *Commutation fares to and from Washington, D. C.*, 33 I. C. C. 428; *Mace v. Pennsylvania R. R. Co.*, 37 I. C. C. 268; *City of Steubenville v. Tri-State Railway*, 38 I. C. C. 281; *New York Commutation Fares*, 42 I. C. C. 354; *Gersch v. N. Y., N. H. & H. R. R.*, 50 I. C. C. 486; *City of East Liverpool v. S. E. L. & B. V. T. Co.*, 51 I. C. C. 563; *Greater Belleville Board of Trade v. E. St. L. & S. Ry. Co.*, 60 I. C. C. 741; *Commuters Club v. W., B. & A. E. R. R. Co.*, 61 I. C. C. 302; *Fares of the Washington-Virginia Ry. Co.*, 62 I. C. C. 200; *Ohio Rates, Fares & Charges*, 64 I. C. C. 493.

(E) DECISIONS OF THE COURTS.

In *Interstate Commerce Commission v. Baltimore & Ohio R. R.*, 43 Fed. Rep. 37 (Circuit Judge Jackson and District Judge Sage concurring) it was held that "party rate" tickets issued by the carriers at reduced rates did not violate sections 1, 2, and 3. The opinion and judgment in that case were affirmed by this Court in *Interstate Commerce Commission v. Baltimore & Ohio R. R.*, 145 U. S. 263. (See Point VIII.)

IV.

THE PROCEEDINGS BEFORE THE COMMISSION.

The amendment was approved on August 18, 1922, and five days later, August 23, 1922, the Commission entered its order fixing September 26, 1922, as the

date for hearing before Commissioner Meyer at Washington. (Tr. 16.) Accordingly notice was served with a list of questions upon which testimony would be received. All carriers by rail subject to the act were made respondents to the proceeding with further notice that each carrier seeking exemption should file a written statement on or before September 15, 1922, showing the grounds therefor.

On November 15, 1922, the case was submitted. On January 26, 1923, the Commission filed its first report (Tr. 19), written by Commissioner Meyer, with whom concurred Commissioners McChord, Aitchison, Campbell, Lewis, Esch, and Cox; dissenting, Commissioners Hall and Potter (concurring), Daniels and Eastman. The Commission fixed March 15, 1923, as the date for the carriers to establish, issue, and maintain "a nontransferable, interchangeable scrip coupon ticket in the denomination of \$90, which shall be sold at a reduction of 20 per cent from the face value of the ticket. We further find that the rates resulting from that reduction will be just and reasonable for this class of travel." (Tr. 28.)

Action on the rules and regulations to govern the issuance of the ticket was deferred for 30 days from the service of the report that the parties might endeavor to agree upon a set of rules and regulations.

On February 23, 1923, after further hearing, the case was submitted on the subject of rules and regulations. On March 6, 1923, the supplemental report (Tr. 44), of the Commission was filed (Commis-

sioners Hall, Daniels, and Potter dissenting) together with a full and complete set of rules and regulations (Tr. 47). On the same day the final order of the Commission was accordingly entered (Tr. 54).

There is no allegation or charge directly or indirectly that all of the parties were not accorded the full hearing provided by the statute or that the proceedings before the Commission were not in all respects regular.

V.

THE PETITION.

The New York Central Railroad Company and forty-seven other common carriers by railroad filed a joint bill to annul and enjoin the order of the Commission as not within its statutory power, or, if it is, to adjudge the amendment of August 18, 1922, as unconstitutional. The appearances before, and the report of, the Commission disclose that the subject matter of the amendment was considered as applicable to all the carriers of all of the several rate groups (Tr. 19). The testimony before the Commission was taken that way; the order was so entered. The petition is along the same lines. No carrier has made any attack in a separate suit against the order. Apparently the carriers have agreed to stand or fall united.

The main charges are that the order is not supported by the Commission's findings (Par. X); that it requires the carriers to perform services at rates which are not compensatory (Par. XI); that it provides for a special rate or rebate whereby the carrier is to

collect and receive from one person a less and different compensation for a similar service than from other persons (Par. XII); that it requires the carriers to violate section 3 and to give undue or unreasonable preference to the holder of a scrip coupon ticket over the holder of a standard fare ticket on the ordinary trains (Par. XIII); that the order was based on the mistaken view that the amendment required the issuances of the tickets at a reduced rate regardless of the evidence which might be adduced at the hearing (Par. XIV); if the amendment did authorize a reduced rate then it is unconstitutional as an arbitrary discrimination which takes property without due process of law (Par. XV); the petitioners are required, without regard to consequences, to try for a period of at least one year an experiment for the purpose of determining whether or not the fare would be reasonable (Par. XVI); the order is void in that pursuant to Section 15-a and other orders of the Commission *estimated reductions* on account of the scrip coupon ticket will not conform to the requirement of the act that the carriers should earn an aggregate annual net railway operating income equal as nearly as may be to 5.75 per cent (Par. XVII); it is void under Section 1 of the act because a just and reasonable fare for the holder of a scrip coupon ticket can not possibly be less than a just and reasonable fare for the transportation of any other passenger receiving the same service (Par. XVIII); the order interferes with the liberty of contract (Par. XIX); the order is void because it requires one carrier to

accept scrip coupon tickets issued by itself or another carrier in payment for a single journey irrespective of the length (Par. XX); the amendment prescribed no rule or standard to guide the discretion of the Commission and its exemption of certain carriers was arbitrary (Par. XXI); the order is not restricted to interstate commerce but applies to intrastate commerce (Par. XXII); the order, if allowed to go into effect, will result in irreparable injury, as petitioners may not recover uncollected amounts in case the amendment ultimately should be declared void. (Tr. 13.)

The main charge is that the order is void on its face.

VI.

THE ALLEGED UNREASONABLENESS OF THE REDUCED RATE.

Similar charges have already been exploded in the *New England Divisions Case*, 261 U. S. 184. The theory of the petition is (Par. IX, Tr. 5) that by its order in *Ex parte 74, Increased Rates, 1920*, 58 I. C. C. 220, the Commission, under Section 15-a, had established as just and reasonable for the transportation of passengers the rate of 3.6 cents per mile "which rate of fare accordingly became the established just and reasonable rate for this service." It is further charged that in *Reduced Rates, 1922*, 68 I. C. C. 676, the Commission reaffirmed that finding. It is then charged that the issuance of the scrip coupon tickets at a reduction of 20 per cent required the companies to carry over their lines passengers at a rate of 2.88

cents per mile, irrespective of the Commission's previous finding. (Tr. 6.) Again, it is alleged (Par. XVII, Tr. 10) that in *Ex parte 74, Increased Rates, 1920*, 58 I. C. C. 220, under Section 15-a, the Commission divided the railroads into four groups and fixed the tentative valuation of the Eastern Group at \$8,800,000,000, and in *Reduced Rates, 1922*, 68 I. C. C. 676, the rate of return at 5.75 per cent reaffirmed the previous valuation; it is further alleged that the passenger revenues of appellees for the year ended December 31, 1922, were approximately \$480,000,000 and that the issuance and use of the coupon tickets will result in a loss of 6 per cent, or approximately \$28,800,000, on the net railway operating income without any substantial increase in the volume of transportation (Tr. 11); this, it is said, is beyond the power of the Commission, in that it requires a reduction at a time when the carriers are not earning the rate of return prescribed on the valuation established by the Commission. Argumentative deductions are similarly drawn with respect to other effects of the order.

All of these allegations and arguments appear to rest on the insecure foundation that because the Commission increased rates in 1914, *The Five Per Cent Case*, 31 I. C. C. 351; 32 I. C. C. 325; fifteen per cent in 1917, *The Fifteen Per Cent Case*, 45 I. C. C. 303; twenty-five per cent in 1918, General Order of Director General, No. 28; and forty per cent (twenty per cent in passenger fares) in 1920 in *Ex parte 74*, 58 I. C. C. 220, all of which were found just

and reasonable (see also *Reduced Rates, 1922*, 68 I. C. C. 676), that any reduced rates, in whatever form, must necessarily, *ipso facto*, be unreasonable, confiscatory, and void.

It is a new theory that the power of Congress and the Commission is limited to rate regulation in the sense that the rate must be made final in the outset. From the beginning a rate fixed by the Commission or otherwise has been expressly made subject to recovery after payment by the shipper when shown to be excessive. Reparation in large sums has frequently been awarded by the Commission and recovered through the courts. *Spiller v. Atchison, Topeka & Santa Fe Railway Co.*, 253 U. S. 117; *Mills v. Lehigh Valley Railroad Co.*, 238 U. S. 473, 481; *Meeker & Co. v. Lehigh Valley R. R. Co.*, 236 U. S. 412, 430, 431; *United States of America v. Director General, as Agent, et al*, 80 I. C. C. 143.

Title IV of the Transportation Act of 1920 is now a part of the Act to Regulate Commerce as amended and preceded the amendment of August 18, 1922. Considering the act as a whole, the amendment should be construed in the light of Title IV of the Transportation Act. Title IV was a part of the Interstate Commerce Act when the Commission entered its orders in *Increased Rates 1920*, and *Reduced Rates, 1922*. (*Railroad Commission of Wisconsin v. C., B. & Q. R. R. Co.*, 257 U. S. 563; *State of New York v. United States*, 257 U. S. 591; *Lehigh Valley Railroad Co. v. Public Service Commission*, 272 Fed. Rep. 758, 767; *City of New York v. United States*, 272 Fed.

Rep. 768; *New England Divisions Case*, 282 Fed. Rep. 306; affirmed, *New England Divisions Case*, 261 U. S. 184.) In all of these cases many of the petitioners in the instant case stood with the Government in the several courts to argue for the power of Congress and the Commission to sustain the orders which brought the enormous revenues to these carriers. Now, when the scale swings back more nearly to an even balance, we are told that any reduction is confiscatory and that the entire railroad structure in the Eastern Rate Group is imperiled.

In *New England Divisions Case*, *supra*, in sustaining the order this Court, speaking through Mr. Justice Brandeis, said (pp. 196, 197):

* * * *The order entered in Ex parte 74*
was at all times subject to change. [Italics ours.]
 * * * * *

Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed six hundred; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also that

the Commission had been confronted with similar situations in the past and how it had dealt with them.

For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure. This remained a common practice after the burden of proof to show that a proposed increase of any rate was reasonable had been declared, by Act of June 18, 1910, c. 309, Sec. 12, 36 Stat. 539, 551, 552, to be upon the carrier. Thus, the practice did not have its origin in the group system of rate making provided for in 1920 by the new Section 15a. It was the actual necessities of procedure and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases. The necessity of adopting a similar course when multitudes of divisions were to be passed upon was obvious. The method was equally appropriate in such enquiries; and we must assume that Congress intended to confer upon the Commission power to pursue it.

That there is no constitutional obstacle to the adoption of the method pursued is clear. Congress may, consistently with the due process clause, create rebuttable presumptions, *Mobile, Jackson and Kansas City R. R. Co. v. Turnipseed*, 219 U. S. 35; *Lindsley v.*

Natural Carbonic Gas Co., 220 U. S. 61; and shift the burden of proof, *Minneapolis & St. Louis R. R. Co. v. Railroad and Warehouse Commission*, 193 U. S. 53. It might, therefore, have declared in terms that if the Commission finds that evidence introduced is typical of traffic and operating conditions and of the joint rates and divisions of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed. As pointed out in *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 579, serious injustice to any carrier could be avoided, by availing of the saving clause which allows anyone to except itself from the order, in whole or in part, on proper showing.

The allegations with respect to the unreasonableness of the reduced rate rest on the same conditions as the allegations of confiscation. That the reasonableness of a rate when based on substantial evidence is a question of fact has long since been settled and has very recently been repronounced. Nor will the court consider the weight of the evidence or the wisdom of the order.

The Baltimore & Ohio Railroad Company, which appeared separately as a party petitioner (Tr. 79), in its brief of 30 years ago in *Interstate Commerce Com-*

mission v. Baltimore & Ohio (post, 40), by its counsel, successfully argued to this Court as follows:

(Brief in 145 U. S. 263, p. 44): We have already pointed out that the term "reasonable" is one of those indefinite terms found in our common law, which refer for their meaning to that innate reason and sense of justice which are supposed to be attributes of the human mind. We have pointed out that the term is incapable of exact definition apart from the facts of the particular case. We meet now the question by what general considerations is a judge to be guided in seeking to ascertain whether the prices fixed by a carrier for its services are "reasonable."

Clearly, if it be possible to show that the rates in question have appealed to the minds of a great number of men as "reasonable," that they have acquiesced in them and acted upon them, such evidence is the best of which the matter is capable. In the face of such evidence all *a priori* theories, even of the judge's own mind, must yield to the consensus of the minds of other men. Now, the evidence we can offer in support of the reasonableness of rates made on the basis of the value of service sold is the consensus of the whole commercial world, including as well the purchasers as the sellers of railroad transportation. Not only have those engaged in commercial pursuits acquiesced in the making of rates on that basis, and made their investments accordingly, but the Courts and the Bar also have likewise ac-

quiesced; and now, after more than a half century of practice based upon that method of fixing rates, the method itself has become one of the laws of commerce in this country beyond the control of the carriers or the purchasers of transportation. Therefore, we say, this law of commerce has become a part of the definition of the term "reasonable rates." There is no longer room for theories of "exact equality," so called, because the basing of rates on the value of service sold necessarily makes inequalities, if "equality" be determined by the "amount and quality of service."

Mr. Victor Morawetz, a well-known authority on the subject, on April 18, 1905, before the Senate Committee on Interstate Commerce, said:

There is a wide range between a rate that is unreasonably high, and therefore illegal as against the shipper, and a rate that is so low as to be confiscatory as against the carrier; for example: Assuming that a railway company may charge 40 cents a hundred pounds for carrying a given article between two points without making the rate unreasonably high and therefore illegal, it is quite possible that this rate might be reduced by legislative action to, say, 30 cents a hundred pounds without violating any constitutional right of the carrier. In this case the maximum rate which would be reasonable and which could be imposed by the carrier upon the shipper would be 40 cents a hundred pounds, and the minimum rate which could be imposed by the legislature on the railway company would be 30 cents a

hundred pounds. * * * It is rarely, if ever, true that there is but one just and reasonable rate for the transportation of a given article between two points. In nearly every instance there is a wide range within which any rate would be just and reasonable, and it is wholly a question of business policy at what point the rate shall be fixed within that range.

The expressions "reasonable rates" and "unreasonable rates" are often used in very different senses. Thus, when it is said that a rate shall be reasonable, this may mean (1) that the rate shall not be unreasonably high and illegal under the common law and the interstate commerce act, or (2) that the rate shall not be unreasonably low in the sense of being confiscatory, or (3) that the rate shall be the particular rate which, in the opinion of a commission or of some particular person, ought to be established between these two extremes. * * * (Hearings, Senate Com., vol. 2, 1904, 1905, 795, 796.)

In an article in the Yale Law Journal, January, 1923, entitled "The Recapture of Earnings Provisions of the Transportation Act," Mr. Charles W. Bunn says (pp. 219, 220):

But before either contention can be examined it is fundamentally necessary to define terms and not to use the expression "reasonable rate" in a double sense. Where a court is called upon to determine what is a reasonable charge either for property or service the question is very different from that presented

when the inquiry is whether a rate fixed by legislative authority takes property without due process. Here we have no concern with the general question of *quantum meruit*. The inquiry, it should clearly be perceived, is whether the legislation takes property without compensation.

Cotting v. Kansas City Stockyards Co., 183 U. S. 79, 95, and *Canada Southern Ry. v International Bridge Co.*, 8 A. C. 723, are frequently cited to prove that the reasonable charge of a carrier involves only the value of the service it renders; and that a carrier so favorably situated as to be able to render a multitude of services and make abnormal profits is still entitled to have its profits disregarded; is entitled, in other words, to the same charge per service as a carrier which has few transactions, such charges not becoming unreasonable because, by reason of their multitude, the aggregate of profits is large. This may be good doctrine where the court is considering only the value of services on the general principles of *quantum meruit*. But, put as a constitutional limitation on legislative power and applied to cases where the court is considering whether legislative rates operate to take property without compensation, it is not consistent with the authorities.

No fallacy is more dangerous than the use of a term in different senses. When it is said that a carrier is entitled to a reasonable rate for service rendered, and therefore that what one carrier receives for a given service

is a conclusive measure of what every other carrier must receive, we are using the term "reasonable rate" in the sense of *Canada Southern Ry. v. International Bridge Co.*, 20 I. C. C. 243, 274. Whilst on the other hand the question here is not a determination on general principles of what are reasonable rates (for the Constitution nowhere guarantees reasonable rates in that sense), but whether rates fixed by legislative authority on the plan of the act will be held confiscatory by the courts and whether the recapture of earnings provided by the act is the taking of private property without compensation.

One who says that Congress can not in the same breath adjudge as just and reasonable the rates charged by a carrier and take away some part of the earnings derived from such "reasonable rates" is playing upon the meaning of a word, using "reasonable" in two senses. The plain fact is that under the act the Commission does not fix "just and reasonable" rates for any particular carrier. It is required to fix what are just and reasonable rates for a group of carriers; rates fair for the average of the group. It says what are just and reasonable rates for a group of carriers to receive and for their shippers and passengers to pay. Its determination that any scheme of rates is just and reasonable is nothing more than the tentative determination provided for by the act.

Let us consider on the authorities the constitutional right of any carrier to object in the courts to rates fixed by legislative authority.

* * * The rates fixed as provided in the act are tentative only and if any carrier's earnings are afterwards recaptured and its property and revenue left exactly where they would have been had rates been fixed originally to yield the same amount, it can make no difference to the carrier whether this result is reached by rates directly fixed for it or by higher rates fixed tentatively for a group, subject to readjustment through recapture.

As already pointed out, the allegations with respect to the unreasonableness of the rates are not only general but they are made jointly by all of the carriers located and operating in the Eastern Rate Group.

VII.

THE COMMISSION HAD THE RIGHT TO LOOK TO "THE SPIRIT AND APPARENT THEORY OF THE LAW," AND THE DISTRICT COURT ERRED IN HOLDING THAT IT RESTED ITS ORDER ON THAT ALONE.

The appellees claim that the Commission ignored its own finding of facts which would not sustain any reduction, and then ordered a reduction of 20 per cent because in that way only could the spirit and theory of the law be carried out. As already observed, the petition does not assail the order for lack of evidence but as contrary to the findings; nor did the District Court hold there was no evidence.

Passing the question whether the issuance of the scrip books at *increased* rates or even at *standard* rates would or would not have made the amendment

effective, the Congressional intent has been an elementary rule of judicial statutory construction since the foundation of the Government. There is no such grave inconsistency in the finding that "the record warrants the view that a coupon ticket at a reasonably reduced fare should be established" (Tr. 28) under the mandate of the statute, and that such was "the spirit and apparent theory of the law," as to convict the Commission of the charge of overreaching completely its powers.

Atlantic Coast Line v. Burnette, 239 U. S. 199, 201, Mr. Justice Holmes:

In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the States, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure. *Central Vermont Railway v. White*, 238 U. S. 507, 511.

Williams v. United States Fidelity Co., 236 U. S. 549, 554, Mr. Justice McReynolds:

It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes. *Wetmore v. Markoe*, 196 U. S. 68, 77; *Zavelo v. Reeves*, 227 U. S. 625, 629; *Burlingham v. Crouse*, 228 U. S. 459, 473.

And nothing is better settled than that statutes should be sensibly construed, with a view to effectuating the legislative intent. *Lau Ow Bew v. United States*, 144 U. S. 47, 59; *In re Chapman*, 166 U. S. 661, 667.

United States v. Farenholt, 206 U. S. 226, 229,
Mr. Justice McKenna:

A court is not always confined to the written word. Construction sometimes is to be exercised as well as interpretation. And "construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text—conclusions which are in spirit though not within the letter of the text." Lieber, 56.

McDougal v. McKay, 237 U. S. 372, 385, Mr.
Justice McReynolds:

* * * but these rules must be accommodated to the facts and the great purpose of Congress effectuated as nearly as may be.

Porto Rico Railway v. Mor, 253 U. S. 345, 348,
Mr. Justice Brandeis:

Furthermore, special reasons exist for so construing the clause in question. The act manifests a general purpose to greatly curtail the jurisdiction of the District Court. If the application of the clause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress. *American Security & Trust Co. v. District of Columbia*, 224 U. S. 491; *Inter-Island Steam Navigation Co. v. Ward*, 242 U. S. 1.

Eastern Extension v. United States, 231 U. S. 326, 333, Mr. Justice Hughes:

The words "treaty stipulation" should not be so narrowly interpreted as to permit the exercise of jurisdiction where the claim arises solely out of the treaty cession. Whether the liability asserted is said to result from an express provision of assumption contained in a treaty or is sought to be enforced as a necessary consequence of the cession made by a treaty it is equally within the policy and spirit of the statute; and the letter of the statute should not be otherwise construed.

Interstate Drainage v. Board Commissioners, 158 Fed. Rep. 270, 273 (C. C. A.), District Judge Philips:

The essential object of judicial construction of a statute is to discover the legislative mind in enacting it. The first step in the analysis is to perceive from the face of the whole act what was the underlying purpose. "The intention of a legislative act may often be gathered from a view of the whole and every part of a statute taken and compared together. When the true intention is accurately ascertained, it will always prevail over the literal sense of the terms. The occasion and necessity of the law, the mischief felt, and the object and remedy in view are to be considered. When the expression in a statute is special or particular, but the reason general, the special shall be deemed general, and the reason and intention of the law-giver will control the strict letter of the law when the latter would lead to palpable injustice, contradic-

tion, and absurdity. * * * A thing within the intention of the Legislature in framing a statute is sometimes as much within the statute as if it were within the letter." In the Matter of Bomino's Estate, 83 Mo., loc. cit. 441.

VIII.

THE ACT OF CONGRESS AND THE ORDER OF THE COMMISSION CREATE NO NEW PRINCIPLE UNFAMILIAR TO EITHER CARRIERS OR PASSENGERS IN TRANSPORTATION.

Section 22 has been in the Act since it was approved February 4, 1887, without substantial amendment, until the present, except to add to the classes who might receive, at the discretion of the carriers, free or reduced rate transportation. Thus, the early act provided "That nothing in this act shall prevent * * * the issuance of mileage, excursion, or commutation passenger tickets." Such tickets are as old as railroad transportation.

The court will take judicial notice that during the working days practically the major portion of the entire down-town population of the great cities of New York and Chicago are transported in and out, morning and evening, on the commutation fares and by the suburban service of the railroad companies. When interstate, such fares are regulated by the Commission. *Commutation Rate Case*, 27 I. C. C. 549.

The right of the carrier to issue party-rate tickets was sustained by this court in a case commenced very shortly, if not immediately, after the first act to regulate commerce was approved.

In *Interstate Commerce Commission v. Baltimore & Ohio*,* 145 U. S. 263, 276, this Court, speaking through Mr. Justice Brown, sustained the right of the carrier to issue a "party-rate ticket" for the interstate transportation of ten or more persons at a lower rate than that charged to a single individual for a like transportation on the same trip, and held that the higher rate was not "an unjust and unreasonable charge" under Section 1, nor an "unjust discrimination" under Section 2, nor an "undue or unreasonable preference or advantage" within the meaning of Section 3. While reference is made to Section 22, it does not appear that the opinion was rested on that section. The Court said (277, 278, 279, 281, 284):

* The Baltimore & Ohio Railroad Company was not a party to the original petition in the District Court, filed March 30, 1923 (Tr. 2). Subsequently, on April 13, 1923, the date of the hearing (Tr. 79), that company, by its counsel, was made a party petitioner by an order of the Court. The records of this Court in the case of *Interstate Commerce Commission v. Baltimore & Ohio Railroad Company*, 145 U. S. 263, contain the brief of counsel for the company in that case. It is noteworthy that the Baltimore & Ohio made identically the same arguments in support of the "party rate" tickets that the Government is now making for the nontransferable interchangeable coupons. Further extracts from the brief of the Baltimore & Ohio Company in that case follow. (See ante, 30.)

JAMES L. TAYLOR, GENERAL PASSENGER AGENT, testified: (Br. 13): A. There is, to a certain extent, a great similarity in the principles that govern the concessions in the several instances. It may be said that in the South particularly our trains have to run between fixed points anyhow, and that there are certain charges and expenses in connection with them that are very little affected by the volume of traffic. Therefore, the more we can increase the traffic of the several characters, the more we believe we increase our profit in the running of those trains. I suppose that that may be said to be a general principle. We desire to increase the traffic over and above what may be said to be fixed or constant traffic, which we believe we would get anyway. We think that what we may get in the shape of this additional traffic may be due very largely to the encouragement which we can afford to give it by special rates, etc.

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit

ARGUMENT OF COUNSEL (Br. 14): The Commission state that their rule of equality by which all passengers riding in the same car from the same starting point to the same destination must each pay the same fare, is no new idea in law, but has always been recognized as a sound proposition of law. If this statement be true, then the issuance of excursion, mileage, and commutation passenger tickets has been legalized for the first time by the Act to Regulate Commerce. That Act applies only to interstate commerce. Therefore, every such ticket issued between points within the same State is to-day illegal. When we find that every railroad company issues such tickets; that in no State is there a reported case, in State or Federal Court, wherein the legality of such tickets has even been questioned; that there is no such case in England—when we find this universal practice acquiesced in universally by the people and the Courts, we can not but believe that the Commission are mistaken. What is common law? By whom has this "idea in law" been recognized as a sound legal proposition?

ARGUMENT OF COUNSEL (Br. 26): The 22d section provides that "nothing in this Act shall prevent," among other things, "the issuance of mileage, excursion, or commutation passenger tickets." The plaintiff's testimony in this case is taken to prove that the so-called "party ticket" was not, in railroad parlance, called or known as a "mileage," "excursion," or "commutation" ticket at the date of the Act's passage. The theory of the Commission is that this provision of the 22d section creates an exception from the rules of the 2d and 3d sections, in favor of certain forms of ticket, and that no form of ticket not then in use, and known as a mileage, excursion, or commutation ticket, in the vernacular of railroad ticket offices, can be included in the exception. On the other hand, the defendant's theory is that this provision of the 22d section recognizes the business principle in pursuance of which the forms of ticket named have been issued, and that it amounts to a legislative construction of the 2d and 3d sections as not forbidding the application of that principle in making passenger rates.

All the witnesses agree that the same business principle induces the making of the reduced rate for party tickets that induces the making of reduced rates on tickets admitted to be commutation tickets. We think the testimony of the plaintiff's own witnesses shows that no meaning can be given the words "commutation passenger tickets," which does not include all tickets issued on the same principle.

greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage where such reduction did not operate as an unjust discrimination against other persons traveling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute. * * *

The question involved in this case is, whether the principle above stated as applicable to two individuals applies to the purchase of a single ticket covering the transportation of ten or more persons from one place to another. These are technically known as party-rate tickets, and are issued principally to theatrical and operatic companies for the transportation of their troupes. Such ticket is clearly neither a "mileage" nor an "excursion" ticket within the exception of section 22; and upon the testimony in this case it may be doubtful whether it falls within the definition of "commutation tickets," as those words are commonly understood among railway officials. The words "commutation ticket" seem to have no definite meaning. * * * The party-rate ticket upon the defendant's road is a single ticket issued to a party of ten or more, at a fixed rate of two cents per mile,

or a discount of one-third from the regular passenger rate. * * *

The testimony indicates that for many years before the passage of the act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, trips for long distances, and trips in parties of ten or more, lower than the regular single fare charged between the same points; and such lower rates were universally made at the date of the passage of the act. As stated in the answer, to meet the needs of the commercial traveler the thousand-mile ticket was issued; to meet the needs of the suburban resident or frequent traveler, several forms of tickets were issued. For example, monthly or quarterly tickets, good for any number of trips within the specified time; and ten, twenty-five, or fifty trip tickets, good for a specified number of trips by one person, or for one trip by a specified number of persons; to accommodate parties of ten or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for the purpose; to accommodate excursionists traveling in parties too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were also issued between cities where travel was frequent. *In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for the reduction of the charge per capita, then such reduction*

*was reasonable and just in the interests both of the carrier and of the public. Although the fact that railroads had long been in the habit of issuing these tickets would be by no means conclusive evidence that they were legal, since the main purpose of the act was to put an end to certain abuses which had crept into the management of railroads, yet Congress may be presumed to have had those practices in view, and not to have designed to interfere with them, except so far as they were unreasonable in themselves or unjust to others. These tickets then being within the commutation principle of allowing reduced rates in consideration of increased mileage, the real question is, whether this operates as an undue or unreasonable preference or advantage to this particular description of traffic, or an unjust discrimination against others. * * **

The evidence shows that the amount of business done by means of these party-rate tickets is very large; that theatrical and operatic companies base their calculation of profits to a certain extent upon the reduced rates allowed by railroads; and that the attendance at conventions, political and religious, social and scientific, is, in a great measure, determined by the ability of the delegates to go and come at a reduced charge. If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing. *If a case were presented where a railroad refused an application for a party-rate ticket upon the ground that it was not intended for the use of the general*

*public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage. * * **

There is nothing in the objection that party-rate tickets afford facilities for speculation and that they would be used by ticket brokers or "scalpers" for the purpose of evading the law. The party-rate ticket, as it appears in this case, is a single ticket covering the transportation of ten or more persons, and would be much less available in the hands of a ticket broker than an ordinary single ticket, since it could only be disposed of to a person who would be willing to pay two-thirds of the regular fare for that number of people. It is possible to conceive that party-rate tickets may, by a reduction of the number for whom they may be issued, be made the pretext for evading the law and for the purpose of cutting rates, but should such be the case, the courts would have no difficulty in discovering the purpose for which they were issued and applying the proper remedy. (*Italics ours.*)

In *Lake Shore & Michigan Southern v. Smith*, 173 U. S. 684, 691, on which appellees will doubtless rely, this Court held that, after the minimum rate for passengers had been established by the State, the act of the Legislature of Michigan providing that one-thousand-mile nontransferable tickets shall be kept for sale at reduced rates at the principal ticket offices of all railroad companies was a taking of the

company's property without due process of law. In delivering the opinion Mr. Justice Peckham¹ said:

And it (the act) assumes to regulate the time in which the tickets purchased shall be valid and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law.

In *Pennsylvania Railroad v. Towers*, 245 U. S. 6, 9, this Court said that the "plaintiff in error relies upon and quotes largely from the opinion of this Court in the *Lake Shore & Michigan Southern v. Smith*, 173 U. S. 684." With respect to the *Lake Shore Case*, this Court held that (p. 10) it "did not involve, as does the present one, the power of a State commission to fix intrastate rates for commutation tickets *where such rates had already been put in force by the railroad company of its own volition*," and (p. 17) "True it is that it may not be possible to reconcile these views with all that is said in the opinion delivered for the majority of the court in the case of *Lake Shore & Michigan Southern Railway Co. v. Smith*, *supra*. The views therein expressed, which are inconsistent with

¹ Concurring, Mr. Justice Harlan, Mr. Justice Brewer, Mr. Justice Brown, Mr. Justice Shiras, Mr. Justice White; dissenting, Mr. Chief Justice Fuller, Mr. Justice Gray, and Mr. Justice McKenna.

the right of the States to fix reasonable commutation fares when the carrier has itself established fares for such service, *must be regarded as overruled by the decision in this case.*"

Citing with approval *Interstate Commerce Commission v. Baltimore & Ohio*, *supra*, this Court, speaking through Mr. Justice Day,¹ said (p. 11):

Having the conceded authority to regulate intrastate rates, we perceive no reason why such power may not be exercised through duly authorized commissions and rates fixed with reference to the particular character of the service to be rendered.

In *Norfolk & Western Ry. Co. v. West Virginia*, 236 U. S. 605, 608, after making reference to *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, this court said:

"It was recognized (in the *North Dakota case*) that the State has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services."

That the State may fix maximum rates governing one-way passenger travel is conceded. Having the general authority to fix rates of a reasonable nature, we can see no good reason

¹ Concurring, Mr. Justice Holmes, Mr. Justice Van Devanter, Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke; dissenting, Mr. Chief Justice White, Mr. Justice McKenna, and Mr. Justice McReynolds.

for denying to the State the power to exercise this authority in such manner as to fix rates for special services different from those charged for the general service. In our opinion the rate for a single fare for passengers generally may be varied so as to fit the particular and different service which involves, as do commutation rates, the disposition of tickets to passengers who have a peculiar relation to the service. The service rendered in selling a ticket for one continuous trip is quite different from that involved in disposing of commutation tickets where a single ticket may cover 100 rides or more within a limited period. The labor and cost of making such tickets as well as the cost of selling them is less than is involved in making and selling single tickets for single journeys to one-way passengers.

The service rendered the commuter, carrying little baggage and riding many times on a single ticket for short distances, is of a special character and differs from that given the single-way passenger.

It is well known that there have grown up near to all the large cities of this country suburban communities which require this peculiar service, and as to which the railroads have themselves, as in this instance, established commutation rates. After such recognition of the property and necessity of such service, we see no reason why a State may not regulate the matter, keeping within the limitation of reasonableness.

On the strength of these commutation tariffs, it is a fact of public history that thou-

sands of persons have acquired homes in city suburbs and near-by towns in reliance upon this action of the carriers in fixing special rates and furnishing particular accommodations suitable to the traffic. This fact has been recognized by the courts of the country, by the Interstate Commerce Commission, and quite generally by the railroad commissions of the States.

In *Intermountain Rate Cases*, 234 U. S. 476, the order of the Commission was alleged to be of momentous consequence. The order was entered under section 4 of the Act to Regulate Commerce, as amended, which established the "hard and fast" long and short haul clause, relief from which could be obtained only by the application to the Commission on a proper showing.

As in the instant case, the order was assailed, *first*, as beyond the power of the Commission; and, *second*, if within its power then section 4, as amended, was void.

Sustaining in all respects the validity of section 4, as amended, and the power of the Commission exercised thereunder, this Court, speaking through Mr. Chief Justice White, said (234 U. S. 485, 494):

* * * *it follows that in substance the amendment intrinsically states no new rule or principle but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the commission as a primary instead of a reviewing function. In other words, the*

elements of judgment or, so to speak, the system of law by which judgment is to be controlled, remains unchanged but a different tribunal is created for the enforcement of the existing law.

* * * * *

As will be seen by the order and as we have already said for the purpose of the percentages established zones of influence were adopted and the percentages fixed as to such zones varied or fluctuated upon the basis of the influence of the competition in the designated areas. *As we have pointed out, though somewhat modified, the zones as thus selected by the Commission were in substance the same as those previously fixed by the carriers as the basis of the rate making which was included in the tariffs which were under investigation and therefore we may put that subject out of view.* (Italics ours.)

The Congress merely enacted into the statute a principle long since practiced by the carriers. That the carriers themselves issued *mileage*, excursion and commutation passenger tickets must not only be admitted but the Commission has made a full finding of facts on the subject. Power hitherto reposed in the carriers was by the statute merely transferred to and reposed in the Commission. Such has been the basis of practically all legislation concerning the carriers, and in the amendment of August 18, 1922, there was no departure in substance, and little in form, from previously existing practices. Appellees make no allegation that the amendment introduced a new and unusual departure from existing transportation conditions.

IX.

THE TEMPORARY NATURE OF THE ORDER IN THAT IT MAY UNDERGO A REVISION AFTER A ONE-YEAR TEST IS IN FAVOR OF THE CARRIERS RATHER THAN AGAINST THEM.

The petition charges that the order is void because "the petitioners are required * * * to try for a period of at least one year an experiment for the purpose of determining whether or not the reduction in fare prescribed by the Commission would be reasonable" (Tr. 9).

It is not unusual for courts to hold that a claim of confiscation may not be made in advance of a practical test of an administrative order.

In the *New England Divisions Case* the order was known as *provisional*. In the instant case the order is referred to as an *experiment*. The difference in name is probably the only difference between the two. In delivering the opinion Mr. Justice Brandeis said: (p. 201).

A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. To grant under such circumstances immediate relief, subject to later readjustments, was no more a transfer of revenues pending a decision than was the like action, in cases involving general increases in rates, a transfer of revenues from the pockets of the shippers to the treasury

of the carriers. That the order is not obnoxious to the due process clause, because provisional, is clear. If this were not so, most temporary injunctions would violate the Constitution.

The order should be made effective, that the companies may try out the rates and report results to the Commission, thus to establish the facts upon which the rights of the parties shall ultimately depend. That course has had the sanction of this Court repeatedly.

Knoxville v. Knoxville Water Company, 212 U. S., 1, 19, Mr. Justice Moody:

But as the case now stands there is no such certainty that the rates prescribed will necessarily have the effect of denying to the companies such a return as would avoid confiscation.

Willcox v. Consolidated Gas Co., 212 U. S. 19, 54, Mr. Justice Peckham:

It may possibly be, however, that a practical experience of the effect of the act by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court.

Northern Pacific Railway v. North Dakota, 216 U. S. 579, 581, Mr. Justice Holmes:

We do not say that experiment may not establish a case in the future that would require a decision upon the question of consti-

tutional law. But we can express no opinion upon it now. The great difficulty in the attempt to measure the reasonableness of charges by reference to the cost of transporting the particular class of freight concerned is well known and often has been remarked. It seems to us that the nearest approach to justice that can be made at this time is to follow the precedent of *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, * * *.

Missouri Rate Cases, 230 U. S. 474, 508, Mr. Justice Hughes:

The acts are valid upon their face as a proper exercise of governmental authority in the establishment of reasonable rates, and each complainant, in order to succeed in assailing them, must show that as to it the rates are confiscatory.

In re Louisville, Petitioner, 231 U. S. 639, 646, Mr. Justice McKenna:

It will be observed, therefore, that an actual experiment of the rates had been voluntarily undertaken and had been in effect for more than eight months before the order under review was entered, and the court conceived that observation of the experiment might secure greater accuracy and confidence in the result, and, besides, inform the court of matters as they progressed.

See also *Minnesota Rate Cases*, 230 U. S. 352, 473; *Des Moines Gas Co. v. Des Moines*, 238, U. S. 153, 173; *Stanislaw County v. San Joaquin Co.*, 192 U. S. 201, 216.

X.

**THE EXEMPTION OF CERTAIN CARRIERS IS NOT
ARBITRARY.**

The petition alleges (Tr. 13) that "The Commission proceeded upon this record to state in form that all carriers other than steam railroad carriers of Class I should be and were exempt from the application of paragraph 2 of section 22 of the Interstate Commerce Act," and that "The Commission delegated to each and several hundred carriers to determine the question whether they should or should not become subject to the law." It is further alleged that this action was arbitrary and in violation of the Fifth Amendment.

In *Wilson v. New*, 243 U. S. 332, the so-called Adamson Act establishing "an eight-hour day for employees of carriers engaged in interstate * * * commerce" (ch. 436, 39 Stat. 721) excepts from its provisions "railroads independently owned and operated not exceeding 100 miles in length, electric street railroads, and electric interurban railroads." Because of the exceptions the act was assailed as making an arbitrary classification. Mr. Chief Justice White, in delivering the opinion, said (p. 354):

The want of equality is based upon two considerations. The one is the exemption of certain short line and electric railroads. We dismiss it because it has been adversely disposed of by many previous decisions. (Citing *Dow v. Beidelman*, 125 U. S. 680; *Chicago*,

Rock Island & Pacific Ry. Co. v. Arkansas, 219 U. S. 453; *Omaha & Council Bluffs Street Ry. v. Interstate Commerce Commission*, 230 U. S. 324; *Chesapeake & Ohio Ry. Co. v. Conley*, 230 U. S. 513, 522-524; *St. Louis, Iron Mountain & Southern Ry. Co. v. Arkansas*, 240 U. S. 518.)

See also *Stafford v. Wallace*, 258 U. S. 495, which sustained the validity of the so-called "Packers and Stockyards Act," which was assailed because the act exempted from its provisions "stockyards of which the area normally available for handling livestock, exclusive of runs, alleys, or passageways, is less than 20,000 square feet."

XI.

THE ORDER DOES NOT APPLY TO AND INCLUDE TRANSPORTATION OF PASSENGERS WHOLLY WITHIN ONE STATE.

In practically all recent petitions to set aside orders of the Commission it has become the practice to throw in as a makeweight the charge that the order applies to both interstate and intrastate commerce and is therefore void under *Employers' Liability Cases*, 207 U. S. 463, 504.

The order is in the usual form. So far as it affects intrastate commerce, the form is the same as the order in the *New England Divisions Case*.

The Amendment of August 18, 1922, to Section 22 is as much a part of the Interstate Commerce Act as any other section. The whole act must be construed together.

The amendment reaches "each carrier by rail, subject to this act."

Section 400 of the Transportation Act of 1920, amending Section 1 of the Act to Regulate Commerce, provides (41 Stat. 474):

That the provisions of this act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * * from one State or Territory * * * to any other State or Territory * * * but shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State * * *.

This provision was "stated, reasoned upon, enlarged, and explained" in *Railroad Commission of Wisconsin v. C., B. & Q. R. R. Co.*, 257 U. S. 563; *State of New York v. United States*, 257 U. S. 591; *Lehigh Valley Railroad Co. v. Public Service Commission*, 272 Fed. Rep. 758, 767; *City of New York v. United States*, 272 Fed. Rep. 768; and *Stafford v. Wallace*, 258 U. S. 495, in which the Packers and Stockyards Act was assailed for the same reason. Also Appendix A, pp. 82, 83, 85, 86, 87; Appendix B, pp. 97, 98, 106, 107, 108.

XII.

CONCLUSION.

The decree should be reversed with directions to the District Court to sustain the motion of the United States to dismiss the petition.

HARRY M. DAUGHERTY,
Attorney General.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

APPENDIX A.

STATEMENTS OF SENATORS ON THE PENDING BILL.

Senator Robinson (Arkansas), January 18, 1922, said (Cong. Rec., vol. 62, pt. 2, pp. 1327, 1328, 1329, 1330, 1331, 1332, 1333):

Mr. President, the demand for the issuance of mileage books for use in travel had become so great in the early part of 1921 that many Senators introduced bills upon the subject. Among those Senators may be mentioned the Senator from Indiana (Mr. Watson), whose bill is now under consideration; the Senator from Tennessee (Mr. McKellar), the Senator from Wisconsin (Mr. Lenroot), the Senator from Missouri (Mr. Spencer), the Senator from Georgia (Mr. Harris), and the Senator from Arkansas (Mr. Robinson.)

* * * * *

The bill provides for the issuance of mileage books at the rate of $2\frac{1}{2}$ cents per mile. The average rate for passenger fares, according to my information, is now 3.6 cents per mile. It is noticeable that the bill contemplates the issuance of these books at a rate substantially lower than the prevailing average passenger rates. I believe that it is 25 per cent less than the average rates now in force.

* * * * *

The demand for this legislation in part grows out of the conditions which have arisen

respecting travel under the prevailing high-passenger rates. The bill does not make its benefits to any particular class of citizens. Any person who desires to do so is at liberty to purchase one of these books. The demand comes in large part from commercial travelers and their associations, manufacturing associations, jobbers' associations, farming organizations, theatrical and moving-picture companies, and, in general, organizations whose representatives travel a great deal.

Undoubtedly the principle upon which such legislation rests, and should be justified, is a recognition of wholesaling in transportation. I am not unmindful of the fact that some of the courts have stated in decisions that the principle of wholesaling is not recognized in the laws in connection with transportation. I have found no case, however, in which such a statement is more than obiter. Undoubtedly the principle of wholesaling is now and has for a long period been applied in connection with freight rates, and no reason can be assigned why it should be applied to freight rates and denied as to passenger rates.

Let us look for a few minutes at the recent history of mileage books in transportation. During the war, in order to diminish travel and thus enable the Government in the Federal operation of railroads more promptly and efficiently to handle freight business, indispensable in the successful conduct of the war, the Director General of Railroads issued

General Order No. 28, embracing section 8, effective June 10, 1918, as follows:

"No mileage ticket shall be issued at a rate that will afford a lower fare than the regular one-way tariff fare."

* * * * *

On August 2, 1918, passenger fare authority No. 26 was issued, reading in part as follows:

"Carriers under Federal control, and their authorized agents, are hereby authorized to supplement tariff now in effect canceling the sale of all forms of mileage and scrip books effective August 20, 1918, such supplements to provide that outstanding tickets will be honored within limit, under conditions shown in tariffs under which sold, or will be exchanged for new scrip books containing coupons of equivalent value."

By that authority mileage books were canceled and their issue forbidden. As I have already stated, one of the important purposes upon which those orders were justified was the desire to reduce travel at that time rather than to promote it. So far as my memory goes, it was not related closely to the purpose of increasing railway revenues.

* * * * *

Let me turn briefly to a consideration of what I believe will be the reasonable effect of this legislation. First, it will tend to stimulate travel. The railroad executives of the country do not seem to realize that by the maintenance of both excessive passenger and freight rates business which ordinarily should be conducted on the railroads is being diverted to other instrumentalities.

Throughout the United States better roads are being constructed and thousands of commercial travelers and others in the course of their regular business are employing automobiles for traveling and thousands of persons are receiving deliveries of freight through automobile trucks and similar means. The reason, in part, for it is that both passenger and freight rates are too high on the railroads. If freight rates were reduced to-morrow, judiciously reduced, intelligently reduced, it probably would promote more business and yield more revenue than the railroads are now receiving, and the same is equally true of passenger rates.

This diversion of traffic from railroads to automobiles and automobile trucks is a policy that is growing, and the railroads can only counteract it by doing something to invite and encourage the public to use their instrumentalities.

I wish to be frank. I am not a transportation expert, and I do not think I am qualified, to tell the Senate or anyone else just what will be the effect of a general increase or reduction in rates. For six months, under the order of the Senate, as a member of a joint commission of Congress I have been trying to look into that question. I know that thousands of cases exist where business is being discouraged, retarded, hampered, and hundreds of cases exist where it has been prevented by reason of the very excessive rates that are being charged by the railroads.

I know that thousands of traveling men in the United States, men who earn their living

as drummers or commercial travelers, have left the road. Some drummers are traveling in automobiles and others are staying at home, for the reason that the passenger rates which they are now compelled to pay have discouraged their employers and have induced them to adopt a restrictive policy in their business.

* * * * *

Just one moment. In the case of passenger rates, if thousands of men have been driven from the railroads to find new means of travel, and thousands of others have been kept at home by reason of the high rates, would it not have been more profitable to the railroads, instead of running empty trains as they are now doing throughout this country, to have filled their trains with passengers at somewhat lower fares?

* * * * *

Before I revert to the statement of the Senator from Iowa let me state that in going home from Washington to Little Rock, Ark., I have found the Pullman cars, which were crowded beyond their capacity prior to the installation of the present rates, since have been half filled to the point of St. Louis. Going from St. Louis south and southwest I frequently have enjoyed the privileges of a private car, few others riding in them, and principally for the reason that the rates have been made so high that the people will not pay them.

There is not a Senator here who travels who does not know that the great trains that come

thundering into the station in this city are coming with their parlor cars and their Pullmans half filled now. The passengers on a train that entered this station over one of the big lines a few days ago were counted, and there were scarcely a hundred. Would it not be more profitable to that railroad and to every other railroad, instead of operating these cars partly empty at the same cost that it would require to operate them when filled, to put into effect rates that would invite travel, and thus secure additional fares?

* * * *

I said these rates were now so high that they discourage travel. The comparison I am making proves that. While the revenues for the first half of 1921, under the high rates I have already described, exceeded the revenues for the first half of 1920 by \$8,666,000 plus, the number of fares paid was approximately \$73,000,000 less in the first half of 1921 than in the first half of 1920. The number of fares paid in the first half of 1920 was 595,771,000. The number of fares paid in the same period of 1921 was only 522,195,000, or more than 73,000,000 less, tending to show that these rates did discourage travel very greatly.

In addition to that, not only were the number of fares sold under the high rate greatly diminished, as I have just shown, but the average journey traveled under the new and high rates for the first half of 1921 was only 35.4 miles, while the average journey under the lower rate in force in the first half of 1920 was 36.41 miles.

I have referred to the receipts from passenger fares by first-class railroads in the United States throughout the period beginning January 19, 1915, and extending to the end of the month of November, 1921. The December figures have not yet become available.

* * * * *

Mr. President, I come now to a consideration of the position taken by the Senator from Iowa (Mr. Cummins), and, as I understand it, by the Senator from Ohio (Mr. Pomerene), that this is a matter which the Interstate Commerce Commission is peculiarly qualified to determine and that the commission ought to be permitted to decide it.

With the general proposition that legislatures can not successfully fix transportation rates, I am in hearty accord. We do not possess the information nor the agencies necessary successfully and intelligently to perform such services. I wish to be entirely frank with the Senate. If I thought the commission would act and act promptly upon the matter I would have no objection to referring it to the Interstate Commerce Commission. But I am advised that the commission have had this matter under consideration for several months, and they stand approximately evenly divided on the question of policy. They now, in my opinion, have the power to authorize the issuance of mileage books in the exercise of their general power to fix just and reasonable rates.

* * * * *

They have the power to promulgate the general rate, which is the same thing in the end, if they choose to exercise it. The difficulty about the matter is this: The commission are overburdened with duties. They are performing very important and very difficult functions. They have been unable to reach an agreement respecting this subject. Merely to authorize the commission to do something which many think they have the power already to do, if they chose to exercise that power, would not be accomplishing very much. But conceding that the commission may not without legislation require the issuance of mileage books, an objection grows out of the fact that great delay will ensue if the matter is relegated to the commission. I do not believe any step Congress can take will more quickly and more vitally restore courage, enthusiasm, and interest among the people of the country in their business affairs than the passage of legislation of this character. It is not a question of general rate making, although, of course, the effect of our action here must be considered in relation to the broader and even more important question of revenues to railroads generally.

It is a comparatively simple matter. If the rate fixed in the bill, in the judgment of the Senate, is too low, if the Senate thinks that the Senator from Indiana (Mr. Watson) in preparing the bill and fixing the rate at which the mileage should be issued at $2\frac{1}{2}$ cents per mile acted unwisely and that the rate ought to be increased, we can do it. We

have sufficient intelligence and information respecting the subject to wisely determine it. I think the rate is about right. The enactment of this legislation will have a wholesome effect. I do not see the slightest necessity for throwing it into the Interstate Commerce Commission, where we know there is such a division of opinion respecting the policy involved in the legislation and probably its relation to revenue that no action is likely to result if the amendment of the Senator from Iowa is agreed to.

I wish to see something done that will revive the business of the country. Nothing has contributed more to the present depressed state of business, to the diminution of the number of sales, to the loss of profits, and the maintenance in many localities of excessive prices than have exorbitant railroad rates. We have to meet this question. The courts in every decision have said that rate making is a legislative function. If we want mileage books issued, we have the power to require their issuance, if any power can require it. There is no reason why the Senate can not intelligently determine the very simple questions involved in the bill. The commission is authorized to modify the rate if that is found necessary.

Mr. President, I have profound regard for the judgment of the Senator from Iowa. In my opinion he is perhaps the best-informed man on transportation questions in the Congress of the United States. I have not only confidence in his judgment but unlimited con-

fidence in his integrity. I am looking at this question from the standpoint of the business interests of the country generally as well as from the standpoint of the interests of the railroads. I think my record in the Senate has demonstrated beyond necessity for vindication on my part, willingness to support and advocate legislation that would put the railroads of the United States on a secure basis and enable them to operate profitably.

I have no hesitancy in saying that I have been disappointed with the manner in which the transportation act has been applied through the instrumentality of the railway executives. Their policies in some particulars have depopularized the very liberal rule of rate making prescribed in that act. They ought to have gone forward in the carrying out of the act in a way that would draw to the railroads the confidence of the people whom they serve. Necessarily many rates in the new tariffs quickly proved the necessity for corrections. Railroad authorities have been slow to make them, slow to make any concessions. For fear of establishing precedents that might later rise to plague them they have stood still when they ought to have advanced.

I indulge the hope that the Senate, having full knowledge of the subject, will enact this legislation, and do it by an overwhelming vote.

Senator Cummins (Iowa), January 18, 1922, said (Cong. Rec., vol. 62, pt. 2, p. 1330):

So far as I am concerned—and I think what I say would be the judgment of every man who knows anything about this subject—there is a

point which measures the maximum producing qualities of a railroad rate, whether freight or passenger; and if the rate is advanced beyond that point the result will be a lessened revenue instead of an increased revenue.

The position I take with regard to this particular bill is that the Interstate Commerce Commission is the best judge with regard to that point, and where the line should be drawn. It is charged with that duty, and it exercises its jurisdiction after hearings and notice and after full information; and it has said that the rates which now prevail are at the point at which they will produce the maximum revenue. I, for one, do not feel like reviewing the action of the Interstate Commerce Commission and insisting that it is less qualified to enter a judgment upon this question than the Congress of the United States, which must necessarily act with very inadequate and imperfect information.

I wanted that to be made perfectly clear before the Senator proceeds further. I agree with everything that the Senator from Arkansas has said.

Senator Cummins (Iowa), January 19, 1923, said (Cong. Rec., vol. 62, pt. 2, pp. 1393, 1394, 1395, 1397, 1399, 1400, 1401, 1402, 1405):

Mr. President, I always listen to the Senator from Arkansas (Mr. Robinson), not only with great pleasure but with great profit. I think he discusses any question with distinguished fairness and clearness, and I am sorry that I feel compelled to dissent from some of the

conclusions to which he has arrived. For a long time during his service upon the Committee on Interstate Commerce of the Senate I think all the members of that committee learned to lean upon him for information and advice, and I, for one, acknowledge in this public way my very great obligation in the Senator from Arkansas for the work that he has performed in connection with this important and vital subject.

I think I ought to say another word, in a preliminary way, so that my position with regard to the general subject may not be misunderstood. I believe in the system of mileage books or tickets; I believe that form of transportation with respect to a great many people is exceedingly convenient. I think that the practice of issuing mileage books in this country ought to be resumed, and I have no doubt whatever that the Interstate Commerce Commission, when vested with the power, which it has not now, in my opinion, to require railroad companies to issue interchangeable mileage books, will speedily make the necessary order.

The question, however, with regard to the difference which shall be established between the ordinary ticket and the mileage book is a question upon which we are not qualified to express a judgment. While the Senator from Arkansas has paid me a very great compliment, which I deeply appreciate, I want to say in all candor that even though I have studied this subject for many years it would be utterly impossible for me, with the information I have,

to determine what should be the difference, if any, as between the ordinary ticket for a specific journey and the mileage book good for any journey.

* * * * *

Second, if it were constitutional, it is manifestly unwise for Congress to attempt to fix either freight rates or passenger rates.

Third, because just at this time we ought not to put any obstacle in the way of the efforts of the commission or the carriers to reduce freight rates. The passage of this bill, as it is now before the Senate, will just as surely arrest the progress of that movement as that time is to go on.

Fourth, the difference of practically 1 cent per mile would be the grossest sort of discrimination in favor of corporations and individuals who can afford to buy \$125 worth of transportation at one time.

Fifth, because it takes direct possession of the authority which, in my judgment, is vested in the several States and attempts to to fix passenger rates within the States and for journeys wholly within the borders of a single State. As earnestly as some advocates of universal and national control have contended for the proposition, Congress never yet has attempted to assert the power of fixing, primarily and directly, the rates either for the transportation of freight or the transportation of passengers wholly within a State.

I shall address myself to these objections in the order that I have named them, first asking that the amendment which I have

offered shall be printed not only, as it would naturally be, in the Record but that it shall be printed so that if this bill is not disposed of to-night it can be laid upon the desks of the several Members of the Senate to-morrow morning.

It must be observed from what I have stated that I do not approach the discussion of this question in a hostile spirit. I mean, I recognize the demand which the commercial travelers of the United States have made for this form of transportation, and I am not prepared to say that they should not have the privilege of buying transportation at wholesale at lower rates than the person who buys a specific ticket for a particular journey. In so far as the selling of transportation in this way and in so far as all the operations which are connected with that transportation are concerned which tend to reduce the cost of the service, the Interstate Commerce Commission may very well, in my judgment, establish a lower rate per mile than the ordinary rate which is now in force or which may be in force at any given time.

I want your attention for a moment to the question of constitutionality.

It would be rather impertinent on my part to enter upon an extensive argument upon the proposition I have just made, inasmuch as I have before me a decision of the Supreme Court of the United States which, in my judgment, is exactly and precisely applicable to the present bill. I beg to say that we have given to the Interstate Commerce Commission

the authority to establish maximum rates—latterly minimum rates also, in some cases—but the general authority is to establish maximum reasonable rates for the carriage of passengers and the transportation of freight. I mention that in order to show that the authority we have given the Interstate Commerce Commission, so far as interstate commerce is concerned, is exactly the authority which the Legislature of Michigan attempted to exercise over the State rates in the case I have before me.

* * * * *

Mr. President, I believe that the Interstate Commerce Commission, in accordance with the principle of this opinion, after it makes the proper investigation, and after it determines that the cost of the service, if it so finds, is less in the case of mileage tickets than in the case of specific tickets, can make a reasonable, fair reduction in passenger fares in behalf of those who use mileage tickets; but it must not be an arbitrary reduction. It must be based upon sound, economic reasons. It must be based upon precisely the same reasons, in principle, which obtain in the case referred to by the Senator from Arkansas in freight rates. The rate per hundred pounds is less in the movement of freight in carload lots than when it is moved in less than carload lots, and for very plain, manifest reasons, because the railroad company can move a given number of pounds in carload lots at a lower cost than it can move the same number of pounds in less than carload lots, and it would be unfair

to establish a tariff that would require the payment of the same rate per pound or per hundred pounds or per ton of freight in carload lots and in less than carload lots.

I want the Senate to remember that the man who has one carload to move moves it at the same rate given to the man who has a hundred carloads of that commodity to move. There is no reduction in the carload rate on account of the number of carloads that any particular shipper may desire to ship. That question has been argued at very great length. It has been urged upon the Interstate Commerce Commission almost from the time the commission was organized, that a great shipper, like the United States Steel Co., or the Standard Oil Co., or any other great factory which furnishes hundreds and thousands of carloads every month or every year, is entitled to a lower rate per carload than the shipper who ships but one carload per year of that commodity; but the commission has stood steadfastly and firmly against the effort to reduce the carload rates because of the extent of the business of the shipper, and I think very wisely.

In this case if the commission, after its investigation, finds that the railroads can afford, by reason of lessened cost, to sell 5,000-mile tickets or 2,000-mile tickets, I believe it has, or would have if my amendment were passed, the authority to require the railroads to issue those tickets; but an act simply declaring that every railroad in the United States shall issue 5,000-mile tickets, usable

and good upon every other railroad in the United States, when the rate established by the commission as a fair and reasonable rate for travel is substantially 1 cent per mile higher than that mentioned in the bill before us, is beyond our power. It is not only unfair and unjust, but it is not within our constitutional authority to enact.

Every man who knows anything about the subject knows that there is not the difference of 1 cent or $1\frac{1}{2}$ cents per mile in the cost of the service, comparing mileage tickets and specific tickets. There may be some difference; I am not prepared to say what it is. I am not well enough informed to say what it is, any more than I am well enough informed to say what should be the rate upon a carload of apples from Arkansas to Chicago or New York. Whenever the Congress of the United States enters upon the field of determining at what rate either commodities or persons shall be carried throughout the United States, it will not only enter a field of chaos and confusion but it will inflict infinite injury not on the railroads alone but upon the commerce of the country as well.

We have organized a commission which has now been functioning for about 26 years, and its members are constantly investigating these subjects, and they are as familiar with them as their mentality will permit them to be. That commission is the proper authority to declare what the rate upon a mileage ticket shall be.

* * * * *

The third objection which I have to the passage of the measure at this time relates to a provision which I shall read again, because just at this time we ought not to put any obstacle in the way of the efforts of the commission or the carriers to reduce freight rates. The passage of the bill that is now before the Senate would just as surely arrest the progress of that movement as time is to go on. We all know that ever since the increase in rates, since the return of the properties to the owners, an increase that was ordered on the 26th of August, 1920, there has been a continuous and, as I thought, praiseworthy endeavor on the part of those who were interested in the commerce of the country to secure a reduction in the rates that were thus established in what is known or referred to by the Senator from Arkansas as *Ex parte* 74.

It was quite impossible, as everybody will see, for the commission having in charge the reestablishment of the credit of the railroad companies, among other things, and having in charge a commerce that is inestimable in magnitude, to issue any order that would be just in all its parts. The commission has been constantly reviewing that order. I suppose there have been 5,000 reductions in rates or readjustments in rates since August 26, 1920.

* * * * *

It has been the policy of the United States for years to submit to an impartial, semijudicial body the question of the just and reasonable rates that ought to prevail throughout the United States, both for the carriage of passengers and the transportation of freight. The

Interstate Commerce Commission is now and has been for a long time, for a year past and more, engaged in an investigation looking to a reduction of all rates, if it be possible to reduce them in view of conditions which now prevail.

I have not even imagined the possibility that Congress at this time or at any time would withdraw from the jurisdiction of the Interstate Commerce Commission the duty of fixing freight rates. For Congress to enter upon the task of adjusting the freight rates of the United States would be simply to publish its incapacity to deal with the subject.

* * * * *

In order to ascertain as well as I could what would be the probable effect of the passage of this bill upon the revenues of the railroad companies, I submitted to the Interstate Commerce Commission an inquiry, and I have the answer of the commission before me. I do not intend to read all of it, because all of it is not material to the point I am now discussing; but part of it is very material.

* * * * *

If we assume, taking the country over, that 25 per cent of the travel would be carried upon mileage books, then upon the average passenger traffic of the last two years the result would be a diminution in revenue of \$69,200,000. If we add to the \$69,200,000 a fair proportion of the Pullman surcharge, which would also be abolished by this bill, the fair result is that the revenue of the railroad companies would be reduced eighty

or eighty-five million dollars a year through the application of the provisions of this bill.

I am not considering whether this reduction would result in such an increase in travel that the net income might be greater than heretofore simply for the reason that that is a question which has been before the Interstate Commerce Commission continuously since the passage of the transportation act—a question upon which that tribunal is infinitely better able to express an opinion than I am or than any other man, in my judgment, who may have occasion to study it casually. It looks at the question from every angle, from every standpoint, and fixes rates accordingly. It is one of the things which, according to the letter of the opinions rendered by the Interstate Commerce Commission, it has taken and must take into consideration.

Mr. President, if we are to accept the judgment of the Interstate Commerce Commission upon questions of that kind, are we prepared to reduce by legislation the passenger revenues of the railroad companies of the country to the extent of eighty or eighty-five million dollars annually?

That is the question we must finally decide by the votes we cast upon this bill.

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Mr. ROBINSON. If the Senator from Iowa will permit me, the Interstate Commerce Commission has no power and can have no power which the Congress does not give it. I do not wish to interrupt the Senator from Iowa to again express my view respecting the subject

but, I think, if Congress has sufficient intelligence and information upon which to determine this question, it can be no reflection on the Interstate Commerce Commission if Congress determines the matter directly.

Mr. CUMMINS. I do not know whether it would be construed as a reflection upon the individual members of the Interstate Commerce Commission or not, but it means that we ought to abolish the Interstate Commerce Commission. If Congress is to undertake to fix rates, there is no necessity for the Interstate Commerce Commission.

* * * * *

I propose to give the Interstate Commerce Commission authority to compel railroad companies to issue mileage books good for not more than 5,000 nor less than 1,000 miles at a just and reasonable rate. That is all. I can conceive of reasons which would justify some difference between the general rate and the mileage-book rate, because there is, I can easily see, some lessened cost of service when one buys 2,000 or 5,000 miles of transportation as against a man who buys 20 or 25 miles of transportation. But I do not pretend to know what that difference would be, if any. It must be supported by such evidence as will show that it is not a discrimination against the man who uses the ordinary ticket.

I am sorry the Senator from Wisconsin did not quite gather the full import of my amendment. That is the very point I want to avoid. I want the discrimination, if there shall be one, based upon sound, economic

reason, and there are some reasons that might influence the commission to issue a mileage book at a slightly less rate than the price of the ordinary ticket.

Mr. LENROOT. I understood the Senator to say it would be difficult for him to explain why a traveling man with a mileage book was permitted to ride at a less rate than one who did not have a mileage book. With the Senator's explanation it seems to me that result will still obtain; that he does contemplate that with this power reposed in the commission by his amendment the commission will have power to compel the sale of mileage books at a less rate than is charged the ordinary traveler who does not purchase them.

Mr. CUMMINS. I am assuming that men who ride on trains are ordinarily intelligent, and while they could easily perceive a justification for some difference in the rates they would not be able to perceive a reason for a difference of 1 cent per mile in the rate.

It is exactly like moving freight in carload lots as distinguished from less than carload lots. The railroads move, and the Interstate Commerce Commission orders them to move, freight in carload lots at a cheaper rate per hundred pounds than the less-than-carload movement is carried for, but it must be a just and reasonable rate; it must be based upon, as I view it, the cost of the service in the two cases. So, Mr. President, I submit that it is the fair conclusion from the facts and conditions which surround us that

if we pass this bill it will constitute a most serious obstacle in the way of a further reduction in freight rates.

* * * * *

Senator Trammell, January 19, 1922 (Cong. Rec. vol. 62, pt. 2, p. 1405):

Prior to the abolishing of the mileage-book privilege, as we all know, the railroads maintained a policy of issuing mileage books in denominations of 1,000 miles, or 2,000 or 5,000 miles.

Under a policy of that kind the average person doing any traveling of any consequence receives the benefit of the privilege of purchasing a mileage book at a reduced rate. I think that if we are going to reestablish this privilege of mileage books, we should not select a favored class, those who are carrying on extensive business, having their agents do extensive traveling, or those with ample means to buy mileage books, and extend the privilege to them only. That will be the inevitable consequence if the privilege is extended only to mileage books of 5,000 miles or more.

I submit the amendment with a view to restoring the policy that formerly existed under the voluntary operations of the railroads. I believe that it is a proper policy, and that the measure should be enacted; but if we are to enact a law of this character, then I believe that we should provide for mileage books in denominations of 1,000 miles or more, and not begin at 5,000 miles.

Quite a good deal has been said about leaving this matter to the discretion of the Interstate

Commerce Commission. I see no reason why the Congress should longer go upon the idea that we must leave to the Interstate Commerce Commission the adjustment of all these problems. What is the history of the State railroad commissions in dealing with this question of passenger transportation? We found in a great many States that the railroad commission of the State did not prescribe as low a rate for passenger transportation as it seemed to the public that conditions justified. On account of the failure of these commissions in some instances—I do not say all of them—to take action providing for more reasonable transportation charges for the traveling public, the legislatures in a great many States have enacted laws prescribing specifically passenger rates. Among the cases that were quite noted in the South was the Alabama Rate Case.

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Mr. President, I believe that a more reasonable charge for passenger travel will result beneficially to the railroads, and most assuredly will result beneficially and helpfully to the traveling public, and I hope this measure will be enacted.

I believe, however, that the measure would be improved and that it would come nearer meeting the situation if the amendment which I have proposed should be agreed to. If this amendment should be adopted, then the privilege of a mileage book will apply to mileage books of 1,000 miles and larger amounts. Certainly the mileage-book privilege should be reestablished.

Senator Capper (Kansas), January 20, 1922, said (Cong. Rec., vol. 62, pt. 2, p. 1454):

Mr. President, I sympathize with the purpose that this bill aims to carry out. I believe that passenger as well as freight rates are too high; but I agree with the senior Senator from Iowa (Mr. Cummins) that Congress should exercise its power by delegating the authority to issue mileage books to the Interstate Commerce Commission. I think the proposition of the Senator from Iowa is incontrovertible, that if Congress should enact this measure without the amendment proposed by him the result would be that the Interstate Commerce Commission would have to take into account the reduction in revenues that such a change in the passenger rates would bring about before it could pass upon the question of a reduction in freight rates. The result then would be a delay in the determination of the matter of freight-rate reduction, which, in my judgment, is a far more important matter.

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The VICE PRESIDENT. The next amendment is that proposed by the Senator from Michigan (Mr. Townsend), which the Secretary will report.

The ASSISTANT SECRETARY. Amend the bill by striking from lines 2, 3, and 4, on page 2, the comma after the word "carrier" and the words "without regard as to whether the points of origin and destination for any single journey or within the same State." The amendment was agreed to. (Cong. Rec., vol. 62, pt. 2, p. 1499.)

Senator Trammell (Florida), January 21, 1922, said (Cong. Rec., vol. 62, pt. 2, p. 1500):

The original bill provided that mileage books should be issued regardless of whether the point of origin and destination were within the State where the ticket was sold. With that provision stricken out, when the Interstate Commerce Commission comes to issue rules and regulations for the enforcement of the law we know of course that there will be no opportunity or chance whatever for commercial travelers representing firms within a given State and confining their travels within that State and for the citizens of a given State traveling within that State to participate in the benefits of the law.

I hope that the amendment will be reconsidered and that the bill will be allowed to stand as it originally came from the committee. Then this question may be subsequently determined, and, if possible, traveling salesmen whose labors are restricted within the borders of a particular State and the traveling public whose travels are largely within a particular State may obtain some benefit under the bill. If the amendment stands as adopted, there is no question that they will receive no benefit whatever under this measure. I desire for the bill to retain the provision under which the people of my State—commercial salesmen or others—may have the privilege of obtaining mileage tickets that can be used in traveling within Florida. The amendment of the Senator from Michigan strikes this paragraph from the bill. I am

opposed to his amendment. It should be reconsidered and defeated.

* * * * *

Mr. WATSON of Indiana. The proposed rate was $2\frac{1}{2}$ cents a mile, as stated by the Senator.

Mr. POMERENE. That meant, if the bill had become a law in that shape, that the Interstate Commerce Commission should require the railroads to issue mileage books at $2\frac{1}{2}$ cents per mile, notwithstanding the fact that, for instance, in some of the intermountain regions the rate is usually 4 or 5 cents per mile. Anyone who is familiar with the construction and operation of the railroads in those sections knows that it would be physically impossible for the roads to maintain themselves at such a rate as $2\frac{1}{2}$ cents per mile. That was one of the serious objections to the legislation.

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Mr. POMERENE. Mr. President, if the Senator will permit me, I have not talked with the Senator from Wisconsin on this subject, but I have talked with several of the other members of the committee, and I have heard one member of the committee say that he doubted very seriously whether the bill was constitutional, and two others express their doubt, and all of them were good lawyers.

Mr. KING. Mr. President, we sometimes condemn the Supreme Court when they say that a law is unconstitutional. If we have any doubts on that score, it seems to me it is better to try to resolve them, if we can, here before, to use the language of the street, we

"pass the buck" to the Supreme Court. It was said by Jefferson, and that view was announced by Hamilton, indirectly, and also by many of the great men in the beginning of our Government, that when we had doubt as to the constitutionality of an act we ought not to pass it. Certainly, if we have doubt we ought to hesitate, we ought to discuss the question involved, in order if possible that the doubt may be dissipated and we may reach a satisfactory conclusion as to what course we should pursue.

Mr. WATSON of Indiana. Mr. President, I should like to make the suggestion to my friend from Ohio that this is an act to amend the interstate commerce act, and that with the word "interstate" stricken out the language is, "Good for passenger carriage upon the passenger trains of all carriers by rail subject to this act."

What act? The interstate commerce act. What carriers by rail are subject to the interstate commerce act? Necessarily interstate carriers; and I am asking the Senator whether this language does not obviate the necessity of any change. (Cong. Rec. vol. 62, pt. 10, p. 9905.)

The PRESIDING OFFICER. Does the Senator from Indiana yield to the Senator from Minnesota?

Mr. WATSON of Indiana. Yes.

Mr. NELSON. It seems to me that merely striking out the word "interstate" does not change the law. It leaves the commission with the power which it has generally, and that power is to fix interstate rates, primarily.

Mr. WATSON of Indiana. Precisely.

Mr. NELSON. And the mere fact that you strike out the word does not in itself give them power over intrastate rates.

Mr. WATSON of Indiana. That is precisely my view.

Mr. NELSON. The mere fact that you strike out that word does not in itself give them power over State rates. It leaves them with the power which they possess under the general Esch-Cummins law.

Mr. KING. Mr. President, may I ask the Senator from Indiana a question?

Mr. WATSON of Indiana. Certainly.

Mr. KING. The Senator is supporting this bill and the committee and the others who are supporting it are doing so upon the theory that it relates to interstate commerce and not intrastate commerce?

Mr. WATSON of Indiana. That is my theory; yes.

Mr. KING. And there is no intention to invade the rights of the States or State commissions to deal with matters that are intrastate in character?

Mr. WATSON of Indiana. No; that is my theory. I have talked with the Senator from Iowa (Mr. Cummins) about this bill. We all know that he is a very able lawyer on all questions pertaining to railroad legislation, and he said to me: "Well, you can go on and bring it up." He said, "I am not quite clear about the constitutionality of it; but, after all, the language may be such that it does not confer upon the commission power to do

anything other than it already has the power to do so far as its relation to interstate commerce is concerned." The same thing is true of the Senator from Minnesota (Mr. Kellogg), whom we all know to be a very profound lawyer on these constitutional questions. (Cong. Rec., vol. 62, pt. 10, p. 9906.)

APPENDIX B.

STATEMENTS OF REPRESENTATIVES ON THE PENDING BILL.

Representative Fess (Ohio), June 29, 1922, said (Cong. Rec., vol. 62, pt. 9, p. 9713):

I do not understand the source of the objection to serving the public in making possible this convenience, because it does no harm either to the public or to the patrons or to the railroads. I understand that the law is so drafted as to protect the railroads. I do not see how the railroads are interfered with in their property rights, since there is no decree, but simply permission to the Interstate Commerce Commission. I do not see the basis of the charge that there is particular advantage to anyone or to any particular class over another. The rights of the public, which are primary in legislation, are conserved, the convenience of the traveling public is respected, and the rights of the railroads are regarded. For these reasons I voted for the rule to make this a special order, and I shall vote for the bill, not as a new venture but rather an expansion of a practice years ago.

Mr. Speaker, every Member of this body recalls the time when the issuance of mileage books for the convenience of the traveling public was a practice pursued by most of the

railroads before the Government inaugurated its policy of Government regulation. It was found to be of great service to the traveler and no loss to the company issuing it and the practice met with wide approval.

An interchangeable book was issued limited to specified roads. While this plan was designed to favor the traveling public, its restrictions for the protection of the issuing company proved somewhat burdensome. During the war the Government adopted a form of interchangeable ticket, common terminals, and consolidated ticket offices. This effort to operate the various roads as a complete system, so far as the traveler was concerned, had some distinctive advantages.

There has always been a genuine demand for an interchangeable mileage privilege. Past practices prove it is workable, and there can be no doubt of its great convenience to the man whose chief activity is on the road. Railroad management has generally considered the convenience of the traveling public and its good will as valuable assets in transportation. Much thought and effort have been exerted along these lines. The mileage book avoids the necessity of the congested ticket-office window and the loss of time waiting in line to purchase the ticket. When made interchangeable its convenience is multiplied.

The charge that it is favoritism in legislation is without force. It is a principle of business universally followed by all responsible concerns to give advantages to induce the larger sales for cash payments.

This recognition is due the commercial traveler. Here is a class of our business life which much of the time live away from home, constantly en route, whose chief outlay is to the transportation companies. His success is not confined to his home, but it represents in a most substantial way the income of the transportation lines, since the goods for which his contracts stand are transported over the railroads. His success will be reflected in the receipts of the road, not only in the actual outlay for his mileage but in freight shipped in accordance with the contracts secured. Here is an army of business boosters on the go. Taken as a whole they cover the entire Nation, if not a good portion of the world, touching every center, big or small, where business is carried on.

Representative Snell (New York), June 29, 1922, said (Cong. Rec., vol. 62, pt. 9, p. 9712):

Mr. Speaker, this resolution, if adopted, provides for the consideration of S. 848, which is known as the interchangeable mileage bill. It is thought that the rights of the railroads are fully protected by the provisions of the bill. There is a general demand all over the country for the consideration of this bill at the present time, and therefore we have presented the resolution.

Representative Huddleston (Alabama), June 29, 1922, said (Cong. Rec., vol. 62, pt. 9, p. 9712):

Now, this bill is brought forward on the pretense and under the guise that it will make a reduction in fares to people who are able

to buy transportation at wholesale. If it meant any such thing, if it really meant that, no honest man could afford to vote for it, because no honest man can afford to vote to give commercial travelers or anybody else something at the expense of the general public.

The Interstate Commerce Commission has decided that railroad fares are as low as they can be made so as to yield the lawful return. If you give any group the benefit of lower fares, you have got to make up the loss out of the general public. In the dearly beloved Esch-Cummins bill we have adopted the principle that the Government will see to it that the railroads are allowed to charge such rates and fares as will cover the cost of the service they render and to provide a 5 $\frac{3}{4}$ per cent profit on top of that. We have established that as the policy of this country. Out of whom are they going to get this cost of service and the profit—this Esch-Cummins return? They have to get it out of somebody. If Congress gives to any group a lower rate than will yield that, then the deficit has got to be made up by overcharging the general public.

I ask the committee whether it is their genuine purpose to give commercial travelers fares which are less than they reasonably and rightfully ought to pay, with the intent to make up what the railroads may lose on carrying commercial travelers out of the general public of this country?

I am in a funny quandary. If this bill meant what its sponsors want it to mean and what the committee are pretending that it means—that is, that purchasers of mileage books and coupon tickets shall ride the trains at the expense of the general public—of course I could not vote for it. On the other hand, if it means that all such persons are to pay their own way, which, if the evidence before the committee is to be believed, will be as much or more than the general public will pay, there can be no objection to passing the bill. The thing that sticks me is, I do not like to be a party to perpetrating a fraud on the commercial travelers or anybody else.

Representative Winslow (Massachusetts), June 29, 1922, said (Cong. Rec. Vol. 62, pt. 9, p. 9714):

We had hearings during a number of days, very interesting hearings. A great many representatives of the travelers' organizations came and stated their case. We at that time were in the midst of hearings on broader propositions affecting the transportation act, 1920. It duly occurred to the committee that we had better develop the general problem a little further with a view of gaining more information that might bear on this particular mileage book bill and so be able, maybe, to arrive at a better final judgment. We therefore postponed further hearings on this bill for a while and later on took them up again and completed them. The bill which came to us from the Senate was merely a bill to direct the Interstate Commerce Commis-

sion after a careful inquiry, after notice and hearing, to require each rail carrier coming under the interstate commerce act to issue mileage books under such regulations and conditions as the commission might see fit to establish. That is all there was to the bill.

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Mr. HUDSPETH. I will state there is a misapprehension on this side that it was confined to a certain class of travelers.

Mr. WINSLOW. It is not; the gentleman is quite right in pressing his inquiry. While this point is up let me repeat clearly what the traveling man understands. This is not a bill for a class, any class at all, but it is a bill for anybody who has the price and the desire to buy tickets at wholesale in such quantities as may be properly determined after notice and hearing by the Interstate Commerce Commission, in behalf of the buyers of wholesale transportation. Does that clear the matter?

Mr. HUDSPETH. It does.

Mr. WINSLOW. I want to say for the commercial travelers that they never held out that we should pass legislation which ultimately might favor them in preference to anybody else, but on the contrary they were very positive in their statements at the outset that the provision should be general for all who might desire to buy a mileage book. Now, bear in mind, gentlemen, that there are two things to consider particularly. One is the scrip coupon which in the art of transportation is a book with a lot of little pieces of scrip detachable in book form, each one of the

scrip representing a definite money value without any connection with mileage whatever, just money value. Say we had 100 on a page, each one worth 5 cents, there would be \$5 worth of coupons, transportation coupons in one form or another as the commission might determine regulations. The other one is in a mileage book. That is like the book of scrip except each little coupon, whether for use either on the train or for exchange at the ticket window, is good for a mile of travel, whether that mile shall cost 1 or 20 cents.

The scrip coupon is good only for the value of each particular scrip. It is important to get the differentiation in your mind to understand this bill, and once you have that, you have the whole thing.

The Interstate Commerce Commission represented by our friend of a year or two ago, the Hon. John J. Esch, stated to the committee that they had misgivings as to their rights to order the issue of mileage books as provided by the Senate bill. That created a doubt in our minds. Various members of our committee entertained like opinions in respect of that and other legal considerations. Moreover, as the gentleman from Ohio (Mr. Fess) has told you, the fares which are allowed to be charged by railroads by the Interstate Commerce Commission, which has the right to establish fares, run, usually speaking, from 3.6 cents a mile up to 6 cents.

The committee realized right away that it was impossible to issue a mileage book in justice to all the rail carriers of the country,

with any definite value or charge for a mileage coupon. For instance, I take one end and go onto a road where the fare is 3.6 cents. If I had bought that coupon book on the base cost of 3.6 cents, I could use it there, good for a mile, but if I took the same book and went on a connecting line, where the fare was 4 $\frac{3}{4}$ cents, what would it mean? It would mean that every conductor would have to have a bookkeeper, an auditor, and a cashier, perhaps, in order to figure up what those fares would be from place to place. It would not be workable or reasonable. So what do we do to meet the situation and still give the commercial traveler every opportunity he has under the Senate bill? We made the provision that the Interstate Commerce Commission should have authority to direct the issue of a mileage book which would be usable equitably on a vast majority of the railroads which might be charging a definite and uniform mileage; but we provided for allowing the Interstate Commerce Commission to exempt a minority of the roads whose fares would be different, the idea being if they saw fit, in their wisdom, after notice and hearing, to direct the issue of a mileage book, they would see this book is good on all the railroads, each coupon for a mile, except on those eliminated. In that case you would not get a universal interchangeable mileage book; but we have left the bill in such form that the commission, in its wisdom and in accordance with the conditions at the time they may legislate, can give the authority to direct the issue of generally

interchangeable, universal mileage books and can exempt certain roads but make the coupons good on the balance of the roads of the country. So much for that.

The other one is this: Failing to find a way in which wisely to bring about the issue of a mileage book, we have provided for the issuance of a scrip book, if the commission wants to direct the issue of such in the interest and convenience of travel. In other words, the coupon has a definite value, and the commission is given authority to make rules and regulations. Under this bill the commission may establish a definite rate per mile or it may establish a definite value for scrip, or it may indicate a discount from one or the other if they choose and think it a wise thing to do.

There has been but one objection to scrip, however, and that is the scalper, and in order to forestall that sort of thing, which was a great nuisance in the old days of the joint mileage books, so-called, on certain railroads, we provided an amendment in addition to the provisions of the Senate bill, which amendment provided for a fine not to exceed \$1,000 for anyone who shall willfully offer for sale or carriage any such coupon contrary to the commission's rules and regulations. In that way we can swoop down on the scalper if he offers any ticket for sale which he might get at a discount and then turn them for single tickets.

I believe I have covered the subject pretty generally. If not, my willing and qualified associates will take the matter up later on.

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Mr. CURRY. I notice on page 2, line 4, of the original bill you strike out the word "interstate" by a committee amendment. What authority has Congress to legislate for intrastate rates, and why was the word "interstate" stricken out?

Mr. WINSLOW. For the reason that this bill covers only such railroads as are under the jurisdiction of the Interstate Commerce Commission.

Mr. CURRY. Under the reading of this bill it does cover other lines.

Mr. WINSLOW. No; it covers only those which come under the transportation act, 1920.

Mr. CURRY. Straight mileage or scrip coupon books at just and reasonable rates could have passenger rates granted upon passenger trains?

Mr. WINSLOW. Yes.

Mr. CURRY. Now you strike out "interstate," and of course the intrastate rates are subject to the Interstate Commerce Commission in interstate traffic, but in the State of New York or in the State of California or the State of Pennsylvania what authority has the Congress to legislate or give authority to the Interstate Commerce Commission to make local rates and compel them to take within the State this mileage book?

Mr. WINSLOW. I do not understand that that comes under this provision of the bill. The gentleman is talking about an interstate carrier?

Mr. CURRY. Yes.

Mr. WINSLOW. They have the privilege of establishing the rates at which they will carry them on a coupon book. What difference whether under a coupon book or without it?

Mr. CURRY. They have not the authority to fix intrastate rates?

Mr. WINSLOW. No; not unless they become a part of an interstate system.

Representative Hawes (Missouri), June 29, 1922, said (Cong. Rec., vol. 62, pt. 9, p. 9716):

Mr. Chairman and gentlemen of the House, as a member of the committee that studied this bill and recommends its passage I would not have the impression go out, as indicated by the gentleman from Alabama, that the proponents of this measure do not understand the bill and every portion of it.

I asked the counsel for the Travelers' Association, composed of 600,000 men, whether they understood this bill to mean that rates would be lowered or if, on the contrary, whether the Interstate Commerce Commission could not, if it desired, actually raise the rates. He said that was his understanding. So this bill does but one thing—it provides a forum for the traveling men of the United States where they can be heard in asking for an interchangeable mileage book or interchangeable scrip tickets. This bill provides a place of hearing. If the national rate-making body desires to lower the rate, it is for them to say upon full hearing and investigation. They may actually, if they so

desire, raise the rates. So the traveling men of America, if the House passes this bill, are not being deceived. They understand exactly what the bill provides for. It is true that the original bill introduced in the Senate had a fixed rate per mile, but in the argument before the committee in the Senate and upon the floor of the Senate the proponents of this bill discovered that that could not be done; that Congress could not fix rates for railroads. So when the bill came into the House before our committee, they had abandoned that position. They understand this bill thoroughly; they want it passed; there is no misunderstanding about it, and all it does is to provide a forum, a place of hearing, for the traveling men of America.

Mr. JOHNSON of Washington. Will the gentleman yield?

Mr. HAWES. Yes.

Mr. JOHNSON of Washington. I take it that the coupon book is not to be sold to traveling men alone; any man can buy a mileage book?

Mr. HAWES. Certainly.

Mr. WALSH. There is nothing in the proposed legislation that would permit the Interstate Commerce Commission by regulation to restrict people who might purchase it, is there?

Mr. HAWES. No, sir.

Mr. WALSH. It would be open to the general public?

Mr. HAWES. Yes.

Representative Barkley (Kentucky) June 29, 1922, said (Cong. Rec., vol. 62, pt. 9, p. 9716):

Prior to the war, when these books were issued by the roads, they were issued at a reduction in the rate below the regular passenger fare. Roads that had a 3-cent regular rate issued these books, I think, at $2\frac{1}{2}$ cents per mile. Some of them, I think, issued them at a rate as low as 2 cents. When the roads were taken back by the owners it was not long until the public began to notice that it was impossible to purchase these mileage books, and even where they were purchased they were not purchased with any reduction in the rate below the regular passenger fare, and most of them were not interchangeable.

I think it is correct to say that very few of the roads have resumed issuing these mileage books, and still fewer of them have issued them interchangeably for use on other roads than their own. Very naturally, as a matter of convenience and economy, there began to be developed a sentiment in favor of the resumption of the practice of issuing these mileage books, and as the roads refused to do it and the Interstate Commerce Commission claimed it had no authority to compel them to do it, a request was made of Congress to pass a law that would require the roads to issue these books. Most of the bills introduced provided for a reduction of the rate below the regular passenger rate. I myself introduced a bill on the subject which provided for a reduction below the regular passenger fare; but when the Senate passed the bill some

question was raised about the constitutionality of a measure which provided that Congress should stipulate that these books should be issued at less than the regular passenger rate, on the ground that Congress was thereby legislating the rate for passenger traffic in the United States. It might be argued in favor of the constitutionality of that provision that Congress, when it fixed the so-called 6 per cent guaranty, attempted to authorize the Interstate Commerce Commission to fix rates high enough to aggregate a return of 6 per cent. But be that as it may, the Senate refused to enact a law providing for any definite reduction below the particular fare or figure at the time and left that matter entirely in the discretion of the Interstate Commerce Commission.

Now, it is true, as the gentleman from Massachusetts (Mr. Winslow) has explained, that this bill is not drawn in behalf of any class or any group. It is true that the traveling men of the country, whose business is on the railroads, and who, of course, appreciate the convenience of a mileage book and also the convenience of economy of a slight reduction from the regular rate where they use these books, have urged this legislation. But these books will be available to the general public on equal terms. The traveling men will appreciate that economy, but in view of the difficulties that have arisen, both in the Senate and in our committee, upon that point, the bill has been reported so far as the committee is concerned in the shape in which it passed the Senate,

leaving it entirely to the Interstate Commerce Commission to say what a reasonable rate shall be, and providing that they shall have the power to provide a rate after hearing all the parties concerned. And that is what the men who appeared before our committee asked for, namely, a chance to go before the Interstate Commerce Commission and present their case and an opportunity whereby they could take their chances with the commission to secure a reduction in the rate below the regular rate for the issue of mileage books.

While it is true that this bill has not been drawn in behalf of any class or any particular group, yet I may say that one particular group has been perhaps more prominent in asking for the passage of this bill than others, because their business is largely on the railroads, and they appreciate more keenly the disadvantage of not having the benefit of mileage books.

But prior to the taking over of the railroads during the war these mileage tickets were accessible to everybody who had the price to pay for them, and thousands of passengers who never were numbered among what we call traveling salesmen availed themselves of the opportunity to buy these mileage books at the wholesale rates, not only as a matter of economy, but as a matter of convenience.

Mr. BUTLER. Members of Congress availed themselves of that privilege.

Mr. BARKLEY. Of course, and so do many thousands of others.

Representative Newton (Minnesota), June 29, 1922, said (Cong. Rec., vol. 62, pt. 9, p. 9717):

The bill before us authorizes and directs the Interstate Commerce Commission to issue what is known as interchangeable mileage books or scrip coupon tickets at reasonable rates to be good for passenger carriage on all carriers subject to the interstate commerce act, with such exceptions as the Interstate Commerce Commission shall find to be advisable owing to dissimilarity of conditions and circumstances.

Before the war it was customary for groups of railroads to issue what came to be known as interchangeable mileage books. In general their use was confined to the traveling salesman, of whom there are possibly 750,000 in this country. The purchaser bought, say, a 3,000-mile book and paid for it at the time of its purchase. If his trip was 100 miles the conductor upon the presentation of the book tore off 100 miles and returned the book with the rest of the mileage to the traveler. Purchasing in wholesale quantities, so to speak, a discount was obtained below the prevailing rate, and then in addition to this advantage the traveler did not have to waste time purchasing a ticket at every station.

The mileage books were in general use throughout the West, but were not good on all roads. In fact, in accordance with my own observation, they were interchangeable on not to exceed some five or six roads.

The war and the taking over of the roads by the Government ended the issuance of

mileage books. After the return of the roads an effort was made to have the railroads reinstate the custom of issuing interchangeable mileage books. The matter was presented to the Interstate Commerce Commission, who questioned their authority to order the roads to do so. This movement was led by the various organizations of commercial travelers and they then presented the matter to Congress. Several bills were introduced in both Houses; some of them called for a universal interchangeable book at a flat rate of so much per mile. It was readily seen that this could not very well be done. In the first place, this would be the direct fixing of a rate by Congress. If this was once commenced there would be no end to it. From a practical standpoint, Congress is not fitted to be a rate-making body. It will be remembered that the previous interchangeable books were not universally interchangeable, but only so in restricted territory where conditions were the same. The present general rate is 3.6 per mile. Some of the short lines charge a higher rate, and in the western mountain country I am informed that the rate sometimes is above 5 cents per mile. Obviously it would not be fair to issue an interchangeable book and have it presented in mountain territory where the rate is 5 cents and the traveler purchased the mileage in the East at, say, 3 cents.

It was then determined to agree upon a bill which would authorize the Interstate Commerce Commission to issue the books at reasonable rates under rules and regulations and

subject to exceptions. Such a bill passed the Senate, and with several amendments the same bill is now before the House. The principal amendments are these: First, we authorize the commission to issue mileage books or scrip coupon tickets as they may think advisable. The representative of one of the large commercial traveler organizations was of the opinion that the scrip plan was the better one. Such a plan could be made universal. Under the mileage-book plan the purchaser would buy 3,000 miles at so much per mile. Under the scrip plan he would buy so many dollars' worth of transportation at whatever cost per mile the company to whom he presented the scrip would charge. There are some advantages in the scrip plan; there are others in the mileage plan. It is claimed that the scrip method could be more easily used by scalpers. For these reasons the committee thought it better to put the whole proposition up to the commission.

To take care of some roads where, owing to mountainous regions or other circumstances, it would be inequitable to sell interchangeable mileage books good on those roads, we have authorized the commission to exempt certain roads from the operation of the act.

When the bill came from the Senate the mileage book so issued would be "good for interstate passenger carriage" only. This would be of little benefit to the commercial traveler.

Of the great bulk of commercial travelers, most of their trips are from town to town,

which would be an intrastate carriage. The mileage book would not be valid for such carriage. For example, the ordinary commercial traveler in Minnesota, the Dakotas, and Montana will travel for several weeks before crossing a State line. Some of them have their territory wholly within a State. If the Senate bill becomes a law, Mr. Smith, getting on the train at Minneapolis and going to Fargo, N. Dak., could use his mileage book, and if that book was purchased at a discount his fare to Fargo would be less than the regular fare to the extent of the discount. Mr. Jones, on the other hand, who took the same train and who sat with him during the entire journey, is getting off at Moorhead, just across the river from Fargo. Moorhead is in Minnesota. Jones's mileage book could not be used for his trip. He would have to buy a ticket, and if there was a discount in the interstate business, he would not get the benefit of any discount on his trip, which was purely intrastate. Hence the committee amendment to strike out "interstate."

It will be observed that these books are to be issued at reasonable rates and under such reasonable rules and regulations as the public interest demands. This makes them available to anyone deeming that method advisable and having the necessary funds with which to purchase transportation at wholesale.

Mr. Chairman, the gentleman from Kentucky (Mr. Barkley) called attention to the authorization and direction to issue "interchangeable mileage or scrip coupon tickets."

He inquired as to whether use of the disjunctive "or" would restrict the commission to either mileage books or scrip and not permit them to issue both if in their judgment that should be deemed advisable. It is my own impression—others on the committee I find agree with me—that the language is clear and that as it now reads the commission would have the authority to direct the issuance of either or both.

Representative Denison (Illinois), June 29, 1922, said (Cong. Rec., vol. 62, pt. 9, p. 9718):

The Clerk then reported the following amendment:

"Page 2, line 4, at the beginning of the line strike out the word 'interstate.'"

Mr. DENISON. Mr. Chairman, I desire to be heard upon that committee amendment. The Members seem to be very impatient, and perhaps do not approve of anyone saying anything either for or against this bill. Several are calling for a vote, but I am going to take up just a moment to state my opposition to this particular committee amendment. It may not have any influence upon a single person in the House, but we have been criticized very severely of late for "passing the buck," as it is called, to the Supreme Court, for passing laws which the Supreme Court promptly holds unconstitutional. I hesitate to rise in the House and object to a bill, or any part of a bill, upon the ground that I think it is unconstitutional. When I first came here I used to be very prompt to do so,

but the longer I stay here the more I hesitate to object to any bill upon the ground that it is unconstitutional. Such objection seems to be looked upon with amusement and not taken seriously. Nevertheless, I am going to record my view upon this question involved in the committee amendment on line 4, wherein the word "interstate" is stricken out.

This bill, as it came from the Senate, applied only to interstate passenger carriage upon the theory that Congress has no jurisdiction to regulate in the manner provided in this bill purely intrastate passenger rates. That has been my view all along. It was clearly the view of the Senate.

* * * * *

I would like to say one or two things more before my five minutes are up, as the time now has been limited. In other words, to accomplish the purposes of this act we are going far beyond the power conferred upon the commission by the transportation act.

The purpose of this act is to reduce fares to certain classes of persons and under certain conditions. Such a purpose is not in harmony with or included in the provisions of the transportation act for preventing discriminations between persons or localities or an undue burden upon interstate commerce. Now, I think, gentlemen, that this bill goes beyond any power heretofore conferred upon the Interstate Commerce Commission in any act of Congress, and that it goes beyond our power under the commerce clause of the Constitution. I think that striking out that word "inter-

state" will render this act invalid if the railroads contest it. I think in the interest of the traveling salesmen, who want this legislation, and all others we would be doing them a favor to put that word back in the act and leave it like the Senate had it. No one interested in this bill asked the committee to make this amendment.

Mr. WALSH. Mr. Chairman, will the gentleman yield?

Mr. DENISON. Yes.

Mr. WALSH. Is not the word "interstate" merely descriptive of the sort of transportation that the public is paying for—this passenger traffic going from one State to another?

Mr. DENISON. The act as it passed the Senate and came to us limited the use of these interchangeable mileage books to interstate tickets or carriage, and in that form I think it was valid. But the committee thought it wise to strike out that word "interstate" and I think that will render the act invalid. The railroads may never contest it. But if they do, I think this committee amendment will destroy the validity of the act.

* * * * *

Mr. Chairman, I think there should be interchangeable mileage books issued by all the railroads, and I am willing to authorize the commission to compel the railroads to issue such books if it can be done under any proper exercise of our constitutional powers. I think, however, that by striking out the word "interstate" the committee has used bad judgment and has made this bill unconstitutional, even if it was constitutional in other respects.

The CHAIRMAN. The Clerk will report the next committee amendment.

The Clerk read as follows:

"Page 2, line 5, after the word 'act' insert 'The commission may in its discretion exempt from the provisions of this amendatory act either in whole or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made.'"

Mr. COOPER of Wisconsin. Mr. Chairman, I would like to ask the chairman of the committee why that particular amendment was inserted in the bill. It is one of exceeding importance. It would permit the commission to exempt from the provisions of this act, an amendatory act, an entire railroad, in its discretion. Why should it be possible for that commission to exercise discrimination as between railroads in a matter so important as this?

Mr. WINSLOW. The theory is this, that the scale of prices for carrying a passenger a mile vary now under the regulations of the Interstate Commerce Commission from 3.6 cents per mile, as a minimum, up to 5 cents or 6 cents a mile, and above, I think, in some instances. Now, it might be, if the commission saw fit to get out a mileage book, that they could get out one covering the great majority of the railroads of the country at 3.6 cents per mile, but other railroads could not afford to carry passengers at that price. So, in order to get out a mileage book, in case they saw fit to order the issue of one, we

provided that they could indicate the roads upon which the general mileage rate would be acceptable, profitable. As some other roads could not carry at the same rate per mile, we realized there should be a right for the commission to make exemptions. Hence this provision.

The CHAIRMAN. The question is on agreeing to the committee amendment.

The committee amendment was agreed to.





FILED
DEC 10 1923
WM. E. STANBURY
CLERK

In Equity No. 469.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, ET AL.,
Appellants,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,
ET AL., Appellees.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

P. J. FARRELL,
For Interstate Commerce Commission,
Appellant.

DECEMBER, 1923.

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BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This is an appeal from a final decree of the District Court of the United States for the District of Massachusetts, annulling and setting aside an order of the Interstate Commerce Commission dated March 6, 1923, which, in part, reads as follows:

It appearing, That on January 26, 1923, the Commission entered its report in the above-entitled proceeding, containing its findings of fact and conclusions thereon, and further hearing having been had with respect to the rules and regulations which shall govern the issuance and use of the interchangeable scrip coupon ticket described in said report; and the Commission having, on the date hereof, made and filed its supplemental report containing its further findings of fact and conclusions there-

on, which report and the said report of January 26, 1923, are hereby referred to and made a part hereof:

It is ordered, That the respondents herein-after named be, and they are hereby, notified and required to establish, issue, maintain, and, on and after May 1, 1923, keep in force, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, a nontransferable interchangeable scrip coupon ticket in the denomination of \$90, which shall be sold at a reduction of 20 per cent from the face value of the ticket, good within one year from the date of its sale for the carriage of passengers on all passenger trains operated by said respondents, except that in the case of special or extra-fare trains its use shall be subject to the payment in cash by the passenger of the special or extra fare, and except in so far as hereinafter specifically exempted: (Rec. 54-55.)

* * * * *

It is further ordered, That the issuance and use of said interchangeable scrip coupon ticket shall be governed by the rules and regulations set out in Appendix D to said supplemental report. (Rec. 58.)

In support of its conclusion that the rate of fare to be applied to the class of transportation covered by the order should be 20 per cent less than the standard fare of 3.6 cents per mile, the Commission said:

* * * We further find that the rates resulting from that reduction will be just

and reasonable for this class of travel.
* * *. (Rec. 28.)

In stating facts upon which it based its conclusion of reasonableness, the Commission, among other things, further said:

The amendment to the act pursuant to which this proceeding was instituted does not upon its face indicate upon what basis an interchangeable mileage or scrip ticket should be issued. The spirit and the apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare, which would be just and reasonable because it would be sold in such quantities as to stimulate travel, and thereby increase net revenue or at least offset any loss in revenue that might result from the reduction in which event carriers would render greater service to the public. It is a well-recognized rule in trade and commerce that, other things being equal, as the price of an article is lowered the sales increase. And the fact that for many years prior to Federal control carriers voluntarily sold mileage books at discounts ranging from 10 to 33 $\frac{1}{3}$ per cent is not without significance. That commutation and excursion fares create traffic is conceded by carriers. That some additional traffic would be created by a scrip ticket at reduced fares may fairly be assumed, although it is impossible to determine how much. Many unused coupons would not be redeemed while others which remained in the book near the end of the year or season would undoubtedly be used for passenger

travel that would not otherwise occur. A scrip ticket at reduced fares could not be justified solely upon the theory that the cost per passenger-mile might thereby be reduced, although it is apparent that anything that will tend to cause a fuller utilization of passenger-train facilities without overcrowding will also tend to reduce the average cost per passenger-mile.

If carriers are to be required to issue a mileage or scrip coupon ticket at a reduced fare it must be mainly upon the assumption that travel will be stimulated thereby. The question whether the mileage or scrip coupon ticket at reduced fare will stimulate travel sufficiently to increase or to equalize any loss in revenue that might result must remain in the realm of speculation until and unless such a ticket is established and experience recorded. The evidence neither proves the affirmative nor the negative of the question whether the mileage book used in the past stimulated travel and whether reductions in fares increased the number of revenue passenger-miles. The evidence as to the use of the mileage books is too indefinite to be helpful, or to afford a guide in determining for the future the question whether a scrip ticket at a reasonable fare below the standard fare would increase or decrease carriers' revenues. The testimony of merchants, manufacturers, and commercial travelers is to the effect that an interchangeable mileage ticket at reduced fares would result in a greater number of salesmen being put on the road. And, of course, the use of such

a ticket would not be restricted to commercial travelers and business men. It would be open to all. In addition to the obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established, at least for an experimental period. In no other way can the apparent purpose of the law be given practical effect. (Rec. 27-28.)

The order of March 6, 1923, was made and entered by the Commission for the purpose of complying with requirements contained in paragraph (2) of section 22 of the interstate commerce act, as amended by an act approved August 18, 1922. The language of said paragraph is:

The commission is directed to require, after notice and hearing, each carrier by rail, subject to this Act, to issue at such offices as may be prescribed by the commission interchangeable mileage or scrip coupon tickets at just and reasonable rates, good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The commission may in its discretion exempt from the provisions of this amendatory Act either in whole or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made. Such tickets may be required to be issued in such denominations as the commission may prescribe. Before making any order requiring the issuance of any such tickets the commission shall make and publish such reasonable rules and regulations for their issuance

and use as in its judgment the public interest demands; and especially it shall prescribe whether such tickets are transferable or non-transferable, and if the latter, what identification may be required; and especially, also to what baggage privileges the lawful holders of such tickets are entitled.

There were two hearings before the Commission, the first of which was followed by the Commission's report of January 26, 1923, which is Exhibit C to the petition, (Rec. 18) and from which we have already quoted, and the second of which resulted in the prescribing by the Commission of rules and regulations in accordance with the requirements of said paragraph (2). Concerning the rules and regulations, however, appellees make no complaint.

Reasons advanced by appellees, in support of their contention that the order of March 6, 1923, is unlawful and void, may be summarized as follows:

1. The Commission's conclusion that the rate of fare named in the order will be just and reasonable is not supported by other findings of fact reported by the Commission.

2. Said rate of fare requires appellees to perform services at rates which are noncompensatory, unreasonable, unjustly discriminatory, and unduly preferential and prejudicial, and therefore in violation of the Fifth Amendment to the Constitution, and of sections 1, 2 and 3 of the interstate commerce act.

3. The Commission based its order upon an erroneous interpretation of section 22 of said act.

4. The order is experimental, arbitrary, and unreasonable, and will not enable the Commission to obtain the information it desires to secure.

5. The order is in conflict with the duty imposed upon the Commission by section 15a of the interstate commerce act to initiate, modify, establish and adjust rates which will furnish to carriers a fair return upon the aggregate value of the properties held and used by them in the service of transportation.

6. The order requires the establishment of the relation of principal and agent and creditor and debtor between carriers without their consent.

7. The order requires carriers to transport passengers for less than the standard fare of 3.6 cents per mile.

8. The order permits carriers exempted by the Commission from the terms of the order to determine for themselves whether they shall become subject to the provisions of said amendatory act of August 18, 1922.

9. The order applies to the transportation of passengers wholly within one State.

The assignments of error, filed on behalf of the United States and the Commission, are seven in number and may be summarized as follows:

1. The court erred in issuing the permanent injunction.

2. The court erred in holding that there is no finding in the record that would indicate that the Commission would have ordered the scrip coupons to be issued at reduced rates

of fare, "if it had exercised an independent judgment apart from what it conceived to be the plain spirit and theory of the amendment" of August 18, 1922.

3. The court erred in holding that, "It is not entirely clear whether the majority of the Commission acted under an interpretation of the amendment that it was mandatory upon them so to reduce the rates for interchangeable scrip coupon tickets, or upon an assured desire of the Congress, though not expressed by the amendment in mandatory form, that they should so do."

ARGUMENT.

I.

THE COMMISSION IS NOT, AS A MATTER OF LAW, REQUIRED TO REPORT THE MINOR FACTS UPON WHICH ITS CONCLUSIONS OF FACT ARE BASED.

A subdivision of Paragraph X of the petition reads as follows:

None of the findings of fact made by the Commission supports the formal finding and conclusion that, even for the experimental period of at least one year referred to in the report of the Commission, a reduction of 20 per cent to purchasers of scrip coupon tickets would result in just and reasonable passenger fares and most, if not all, of said findings strongly negative such conclusion. (Rec. 7.)

The statements contained in this subdivision appear to be based upon the assumption that it is the duty of the Commission to report the minor facts

upon which its conclusions of fact are based, but the contrary of this proposition is correct. The duty imposed upon the Commission in this connection is shown by paragraph (1) of section 14 of the interstate commerce act, which reads:

That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

This court called attention to the distinction between reparation and other cases in its decision in *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, wherein it said:

* * * The 1906 amendment, in modifying section 14 so as to dispense with the necessity of formal findings of fact except in cases where damages (or reparation) are awarded, and sections 15 and 16 so as to give a greater effect than before to the orders of the Commission other than those requiring the payment of money, renders it not less but more appropriate that, so far as practicable, all pertinent objections to action proposed by the Commission and the evidence to sustain them shall first be submitted to that body. * * *. (Id. 489-490.)

It is therefore apparent that, even if the conclusions set forth in the subdivision of the petition

referred to were correct, they would not justify a decree of the court annulling and setting aside the Commission's order. That the conclusions are not correct, however, we believe to be clearly indicated by matters to which we will call attention under the next heading.

II.

THE ORDER OF MARCH 6, 1923, DOES NOT REQUIRE APPELLEES TO PERFORM SERVICES FOR A RATE OF FARE WHICH WILL BE NONCOMPENSATORY OR COMPEL THEM TO ESTABLISH AND MAINTAIN A RATE OF FARE WHICH WILL BE UNREASONABLE, UNJUSTLY DISCRIMINATORY, OR UNDULY PREFERENTIAL AND PREJUDICIAL.

Counsel for appellees seems to base his contention that the rate of fare prescribed by the order is noncompensatory upon the Commission's finding that for Class I steam roads for the year 1921 the operating ratio for passenger service was 85.24, but, as hereinbefore shown by quotations from its report, the Commission proceeded upon the theory that the issuance and sale of the scrip coupon ticket will increase the passenger business of the petitioners and other carriers to an extent sufficient to offset, and more than offset, any loss in revenue which would otherwise result from a reduction in the rate of fare. We feel certain that when the court considers the action taken by the Commission in making the order in connection with what the Commission said in its report of January 26, and its supplemental report of March 6, it will readily conclude that the Commission would not have made the order if it had not been convinced that compliance therewith would bring

about an increase in the passenger business of the carriers and a reduction in the per unit cost to them of that business, and result in a benefit to both the carriers and the general public. If this view of the Commission proves to be correct, it is evident that the contention that the rate of fare specified in the order is noncompensatory will have no foundation upon which to rest.

As already shown by us, the Commission found that the rate of fare prescribed by the order will be just and reasonable for the class of traffic to which it is to be applied, and this finding is binding upon the court if it is based upon substantial evidence.

We do not find in the petition any allegation to the effect that the Commission's finding of reasonableness is not supported by the evidence included in the record which was made in the proceedings before the Commission upon which the order of March 6 is based, but, as hereinbefore shown, appellees contend that said finding is not supported by other findings of fact set forth in the Commission's reports of January 26 and March 6, 1923.

In addition to findings of the Commission to which we have already called attention, the Commission stated that the average number of passengers per train, which in 1916 was only 57, increased gradually thereafter until in 1919 it was 82, but decreased rapidly after the standard rate of fare was increased to 3.6 cents per mile in 1920, until for the first six months of 1922 it was only 60; that during the same time the average number of passengers per car,

which in 1916 was 16, increased gradually until in 1919 it was 21, but for the first six months of 1922 was only 15; that the revenue passenger miles which in 1916 totaled 34,586,000,000, increased gradually thereafter until in 1920 they were 46,849,000,000, but for the first six months of 1922 were only 16,487,000,000; that the carriers now have in effect commutation, convention, excursion, and summer and winter, fares, which are less in each instance than the standard fare; that the carriers now have in effect an interchangeable scrip coupon ticket, in denominations of \$15, \$30, and \$90, which they sell at the standard rate of fare of 3.6 cents per mile, and that there is evidence in the record which was made before the Commission to the effect that carriers now sell tourist, and summer and winter excursion tickets at rates of fare which are $33\frac{1}{3}$ per cent less than said standard rate of fare. (Rec. 22.)

It is a fair assumption that the carriers would not have made the reductions mentioned if they had not been of opinion that the reductions would result in a benefit to them. What they are doing now in making reductions is, of course, based upon the experience they have had in the past in connection with reductions, and is therefore much better evidence of the result they believe will follow the reduction the Commission is requiring them to make than would be any estimates they might make for the purpose of escaping control by the Commission in the premises.

Action taken by it in making the order indicates that the Commission was unable to agree with wit-

nesses of the carriers who expressed the opinion that if a rate of fare less than the standard fare were applied to the class of traffic covered by the order a reduction in the net revenues of the carriers would be the inevitable result, but it is also true that the Commission agreed only partially with witnesses who testified in support of the application for the establishment of a reduced rate of fare. In its report of January 26, the Commission, among other things, said:

Certain witnesses stated that there was a substantial falling off in the number of commercial salesmen on the road during 1921 and during the first six months of 1922 as compared with 1920. They attribute this to the high passenger fares established as a part of the general increases of August, 1920; and say that many salesmen who operate on a commission basis and many mercantile houses refrained during those periods from inaugurating road trips because of the high passenger fares. (Rec. 25.)

With the conclusion thus stated the Commission agreed only to the extent of saying:

* * * The passenger fare was undoubtedly a contributing cause, but it is contrary to the evidence to say it was the only or even the chief cause. * * *. (Rec. 25.)

That the decree of the lower court was not based upon any insufficiency of evidence in the record which was made in the proceedings before the Com-

mission is plainly indicated by the opinion of that court, from which we quote as follows:

Although the carriers opposed any reduction in rates for the scrip coupons below the standard rates, it is clear from the record that the Commission proceeded on the assumption that the spirit and theory of the congressional amendment required them to order the scrip coupons to be issued at reduced rates, at least in so far as such rates could not be deemed confiscatory. There is no finding in the record that would indicate that the Commission, if it had exercised an independent judgment, apart from what it conceived to be the plain spirit and theory of the amendment, would have ordered the scrip coupons to be issued at reduced rates. The only finding of the Commission that could possibly be relied upon as indicating that the Commission exercised an independent judgment is the statement in the majority report that:

"In addition to the obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established, at least for an experimental period."

But this finding is followed by the statement that:

"In no other way can the apparent purpose of the law be given practical effect."

It would seem fairly plain, therefore, that the furthest the Commission goes in its finding is to conclude that the record might justify

the issuance of coupons at reasonably reduced rates for an experimental period; but there is nothing to indicate that the Commission, if it had felt free to exercise its own judgment, would have assumed the responsibility for establishing the reduced rate, even for an experimental period. (Rec. 91-92.)

We respectfully submit that the interpretation by the lower court, above shown, is not justified by the language of the Commission to which that court referred. It will be observed that the Commission stated that its finding of reasonableness was based upon matters other than "the obvious spirit of the law."

In speaking of the construction placed by the Commission upon the amendment of August 18, the lower court further said:

It is not entirely clear whether the majority of the Commission acted under an interpretation of the amendment that it was mandatory upon them so to reduce the rates for interchangeable scrip coupon tickets, or upon an assumed desire of the Congress, though not expressed by the amendment in mandatory form, that they should so do. * * * (Rec. 92.)

In this connection, however, the lower court did not refer specifically to any statement made by the Commission, and we are unable to find, either in the Commission's report of January 26 or its report of March 6, anything which appears to us to indicate that the Commission was of opinion that the amend-

ment of August 18 required it to prescribe for use in connection with the scrip coupon ticket covered by the order of March 6 any rate of fare other than such as it might, after hearing and investigation, find to be just and reasonable in the premises.

Appellees' contention that the order requires them to establish and maintain a rate of fare which will be unjustly discriminatory and unduly preferential and prejudicial appears to be based upon the view that, as a matter of law, the Commission may not classify separately the passenger traffic under consideration and apply to it a rate of fare less than the standard fare. Making classifications, however, is one of the administrative duties imposed upon the Commission by the interstate commerce act. Carriers also are continually exercising judgment and taking action in this connection. And that the making of classifications is something which necessarily involves the making of discriminations is a proposition that no one acquainted with the facts will attempt to deny. Every freight classification discriminates as between the different classes of freight traffic, but such discriminations are not necessarily unjust. Whether such injustice exists, as a fact, in a particular case, is a matter to be determined by the Commission, subject to review in court for the purpose only of determining whether, in reaching a conclusion in the premises, the Commission has acted beyond the power duly conferred upon it by the law under which it operates.

In making the classification involved in this particular case, the Commission simply complied with the mandate of Congress contained in the amendatory act of August 18, 1922. It is therefore obvious that members of Congress were of opinion that the passenger traffic to which the scrip coupon ticket is to be applied should be classified separately from other passenger traffic, and with this view it must be assumed that carriers, including appellees, agree, because, as hereinbefore shown, they now have in effect an interchangeable scrip coupon ticket which is practically identical with the scrip coupon ticket mentioned in the Commission's order. The contentions of appellees, though, are not predicated upon the fact that a separate classification has been made, but are based instead upon the fact that a rate of fare has been prescribed in connection with the classification which is less than the standard fare of 3.6 cents per mile.

By the amendatory act mentioned, Congress did not require the Commission to prescribe in connection with the scrip coupon ticket a rate of fare which would be less than the standard fare, but a statement that Congress did not expect the Commission to do so would not harmonize very well with matters of which the court will take judicial notice.

Congress must have known that at the time of the passage of the amendatory act the carriers had in force an interchangeable scrip coupon ticket practically identical with the scrip coupon ticket provided for in the act, and that in connection with the use of

such ticket the carriers were exacting the standard fare. Congress must have known, also, that at the time of the passage of the amendatory act carriers were applying to passenger traffic classified by them as commutation, convention, and excursion, including summer and winter excursions, rates of fare substantially less than the standard fare. Under these circumstances it does not seem reasonable to assume that Congress would have passed the amendatory act if it had not expected the result to be a separate classification of passenger traffic to which a rate of fare less than the standard fare would be applied. It did not itself prescribe the rate of fare, because it wished to obtain, in that connection, the judgment of its agent, the Interstate Commerce Commission. We find it difficult to understand why discriminations in rates of fare as applied to different classes of passenger traffic should be regarded as just and lawful when voluntarily practiced by carriers, but be regarded as unlawful and void when required by orders of a regulating tribunal which has jurisdiction over the carriers and the traffic covered by the orders.

In its report of January 26, the Commission said:

* * * The spirit and apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare, which would be just and reasonable because it would be sold in such quantities as to stimulate travel, and thereby increase net revenue or at least offset any loss in revenue

that might result from the reduction, in which event carriers would render greater service to the public. (Rec. 27.)

And, based upon these statements, counsel for the appellees contends that the Commission interpreted erroneously the amendatory act of August 18, 1922. In what we have already said, however, we think a sufficient answer to this contention has been made. The Commission does not, of course, contend that the amendatory act should be interpreted in a manner which will do violence to the language therein contained, but expressing an opinion that Congress expected the Commission to prescribe, in connection with the separate classification Congress had required the Commission to make, a rate of fare which would be less than the standard fare of 3.6 cents per mile, is not the equivalent of such an interpretation.

Counsel for appellees further contends that the rate of fare prescribed by the order of March 6, is arbitrary and unreasonable because experimental in character, but a like contention could consistently be advanced in connection with every order made by a regulating tribunal for the purpose of controlling action to be taken by carriers in the future. When carriers, for the purpose of increasing their passenger business and net revenues, first began to prescribe rates of fare less than their standard fares to induce summer and winter tourists to travel between points in the east and points in the west, between points in the north and points in Florida, between points in the United States and points in

Canada, etc., they necessarily experimented, and the reduced rates of fare they now have in effect, and apply to the special classes of traffic mentioned, undoubtedly result from the information obtained by the carriers in making such experiments.

The Commission stated frankly that it could not be certain that the result of establishing and maintaining in force the interchangeable scrip coupon ticket provided for in its order of March 6 would be what it hopes for and expects, but it expressed a willingness to reconsider the subject matter of the order after it shall have been in force for a comparatively short period of time. In this connection the Commission said:

* * * Any party to this proceeding may bring the matter to our attention for further consideration on or about January 1, 1924, with such statements as they choose to make concerning the operation and effect of the scrip tickets. (Rec. 28.)

However, counsel for the appellees insists that the maintenance in force of the scrip coupon ticket will not enable the Commission to obtain the information it desires to secure. If this be true, it necessarily follows, we submit, that the estimates of the carriers' witnesses contained in the record made before the Commission in connection with the matters now under consideration should be entirely disregarded, because those estimates are based by them upon experiences they have had in the past. However, we do not believe this view is correct. We have shown that

the carriers now have in effect an interchangeable scrip coupon ticket in denominations of \$15, \$30, and \$90, and concerning it, the Commission, among other things, said:

* * * The revenue from its sale is estimated to represent about 1 per cent of the total passenger revenue. * * *. (Rec. 24.)

If the scrip coupon ticket prescribed by the order of March 6, is maintained in force for a certain period of time, and at the end of that period of time it is shown that the revenue derived from its sale by the carriers has increased from the present 1 per cent to 20 per cent, and that meanwhile there has been no decrease in the revenues derived by the carriers from other classes of passenger traffic, that will be persuasive evidence that the maintenance of the lower rate of fare has resulted in a material increase in the passenger business of the carriers.

III.

THE ORDER OF MARCH 6 IS NOT IN CONFLICT WITH THE DUTY IMPOSED UPON THE COMMISSION BY SECTION 15a OF THE INTERSTATE COMMERCE ACT.

Two subdivisions of Paragraph XVII of the petition read as follows:

The aforesaid order of the Commission of March 6, 1923, is unlawful and void in violation of Section 15a of the Interstate Commerce Act, which requires the Commission to initiate, modify, establish and adjust rates so that the carriers as a whole or in each of such rate groups as the Commission may from time to

time prescribe, will, under honest, efficient and economical management and reasonable expenditures for maintenance of way and structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.

* * * * *

The Commission, in requiring such large reductions in net railway operating income at a time when the carriers were not and are not earning the rate of return prescribed on the valuation established by the Commission, disregarded the provisions of the Interstate Commerce Act requiring it to establish such rates that the carriers of the Eastern group would earn an aggregate annual net railway operating income equal as nearly as may be to 5.75 per cent upon the aforesaid aggregate value of the railway property of such carriers held for and used in the service of transportation, and acted beyond the scope of power delegated to it by said Act. (Rec. 10-11.)

The views contained in these subdivisions appear to be based upon the conclusion of appellees that compliance by them with the order of March 6 will result in a decrease in their net revenues from passenger traffic, but we think matters to which we have called the attention of the court indicate clearly that the Commission would not have made the order if it had not been convinced that com-

pliance with its terms would increase the passenger business of the appellees and other carriers to an extent sufficient to offset, and more than offset, any loss in revenue which would otherwise result from a reduction in the rate of fare.

In a case like the one under consideration here, where the evidence is necessarily of such a character as to justify differences in opinion, the court will not substitute its judgment for the judgment of the Commission as to an administrative matter within the Commission's jurisdiction. It will refrain from interfering until after opportunity has been afforded for a proper test in the premises. A question identical in principle with the one we are now discussing was before this court in *Willcox v. Consolidated Gas Company*, 212 U. S. 19, and, in declining to enjoin the enforcement of an order of the Public Service Commission of New York, the court said:

In this case a slight reduction in the estimated value of the real estate, plants and mains, as given by the witnesses for complainant, would give a six per cent return upon the total value of the property as above stated. And again, increased consumption at the lower rate might result in increased earnings, as the cost of furnishing the gas would not increase in proportion to the increased amount of gas furnished.

The elevated railroads in New York when first built charged ten cents for each passenger, but when the rate was reduced to five cents it is common knowledge that their receipts

were not cut in two, but that from increased patronage the earnings increased from year to year, and soon surpassed the highest sum ever received upon the ten cent rate.

Of course, there is always a point below which a rate could not be reduced and at the same time permit the proper return on the value of the property, but it is equally true that a reduction in rates will not always reduce the net earnings, but on the contrary may increase them. The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test. In such a case as this, where the other data upon which the computation of the rate of return must be based, are from the evidence so uncertain, and where the margin between possible confiscation and valid regulation is so narrow we can not say there is no fair or just doubt about the truth of the allegation that the rates are insufficient. (Id. 50-51.)

IV.

THE ORDER OF MARCH 6 IS NOT INVALID BECAUSE IT REQUIRES CARRIERS TO ESTABLISH BETWEEN THEMSELVES, WITHOUT THEIR CONSENT, THE RELATION OF PRINCIPAL AND AGENT AND CREDITOR AND DEBTOR.

In Paragraph XIX of their petition, appellees contend that the order of March 6 is unlawful and void, first, because "it requires the establishment of the relation of principal and agent and creditor and debtor, between carriers without their consent and requires one carrier to furnish transportation

upon the credit of another carrier," and, second, because "it also requires the carriers issuing scrip coupon tickets over whose lines no part of the transportation is used to perform substantial accounting and other services without compensation therefor." (Rec. 12.)

Contentions similar to these were made in *Atlantic Coast Line Railroad Company v. Riverside Mills*, 219 U. S. 186. That case involved the amendment of June 29, 1906, to section 20 of the interstate commerce act, known as the Carmack amendment, which made the initial carrier liable for injuries resulting from loss of or damage to property while being transported, regardless of whether the loss or damage occurred upon the line of the initial carrier or upon the line of one of its connections, but gave the initial carrier a right to collect in turn such sum of money as it might be required to pay in damages from the connecting carrier if the loss or damage occurred on the line of the latter. For reasons similar to those now advanced by appellees, the Atlantic Coast Line contended that the Carmack amendment was unconstitutional, and in holding this contention to be unsound, this court, among other things, said:

That a situation had come about which demanded regulation in the public interest was the judgment of Congress. The requirement that carriers who undertook to engage in interstate transportation, and as a part of that business held themselves out as receiving packages destined to places beyond their own

terminal, should be required as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation. The rule is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility. The regulation is one which also facilitates the remedy of one who sustains a loss, by localizing the responsible carrier. Neither does the regulation impose an unreasonable burden upon the receiving carrier. The methods in vogue, as the court may judicially know, embrace not only the voluntary arrangement of through routes and rates, but the collection of the single charge made by the carrier at one or the other end of the route. This involves frequent and prompt settlement of traffic balances. The routing in a measure depends upon the certainty and promptness of such traffic balance settlements, and such balances have been regarded as debts of a preferred character when there is a receivership. Again the business association of such carriers affords to each facilities for locating primary responsibility as between themselves which the shipper can not have. These well-known conditions afford a reasonable security to the receiving carrier for a reimbursement of a carrier liability which should fall upon one of the connecting carriers as between themselves. (Id. 203-204.)

In this connection, pertinent language of the lower court was as follows:

The amendment itself is attacked as unconstitutional, in that in requiring the interchangeable scrip coupons it compels an interchange of credit between the railroads and thereby compels a service at the risk of complete financial loss in case of the insolvency of the road from which the scrip may have been purchased. In our judgment, the decisions of the Supreme Court upholding the Carmack Amendment (*Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, * * *) the right of a legislature to compel the interchange of cars (*Michigan Central R. R. Co. v. Michigan R. R. Commission*, 236 U. S. 615, * * *) and of Congress to compel the establishment of joint rates (*St. Louis Southwestern Ry. Co. v. U. S.*, 245 U. S. 136, * * *) necessarily involve the determination of the right to compel an interchange of credits as between the roads despite the possible loss from such an insolvency. As the Commission points out, the railroads themselves have maintained the interchangeable scrip coupons established under government operation, and have thus voluntarily established a similar interchange of credits over all roads except electric and short-line carriers. Under the present amendment, the extent of such credit interchange is left to the Commission, and must, of course, be reasonable; but in requiring the interchange in respect to the scrip coupons, the action of Congress must be upheld as a constitutional

exercise of power within the aforesaid decisions. (Rec. 93.)

If the power to regulate interstate and foreign commerce and the instrumentalities thereof were to be confined within limits as narrow as those suggested by the two subdivisions of Paragraph XIX of the petition above quoted, it is apparent that the effort of Congress, shown in amendments to the interstate commerce act contained in the transportation act, to assist in building up and maintaining an adequate national railway transportation system, primarily for the accommodation of interstate and foreign commerce, but incidentally also for the accommodation of intrastate commerce, would at the most result in only a partial success.

V.

THE ORDER OF MARCH 6 IS NOT RENDERED INVALID BECAUSE THE INTERCHANGEABLE SCRIP COUPON TICKET PROVIDED FOR THEREIN APPLIES TO TRANSPORTATION REGARDLESS OF THE EXTENT TO WHICH THE TICKET MAY BE USED ON A PARTICULAR LINE.

A sentence appears in Paragraph XX of the petition, which reads as follows:

The aforesaid order of the Commission of March 6, 1923, is unlawful and void because it requires a carrier to accept scrip coupon tickets issued by itself or another carrier in payment for a single journey irrespective of the length of that journey and irrespective of the fact that the holder of the scrip coupon ticket may use the scrip coupon ticket for no other journey over the line of the carrier in question. (Rec. 12.)

This seems to us to indicate that counsel for the appellees leaves entirely out of view the effort of Congress above mentioned to build up and maintain a national railway transportation system as distinguished from individual railroads.

Also, counsel appears to us to ignore important conditions connected with the purchase and use of the scrip coupon ticket provided for by the order of March 6, which do not apply where the standard fare is paid. The purchaser of such a ticket must pay in advance for 2,500 miles of transportation, and must use personally all the coupons contained in the ticket within twelve months from the date of purchase in order to secure the full benefit of the reduction below the standard fare at which the ticket is to be sold by the carriers. If he does not use more than 2,000 miles within the period of twelve months he will receive no benefit at all, because, where the coupons are not all used during the period of limitation mentioned, and the purchaser presents the unused coupons for redemption, he is required to pay for what he has used the full standard fare.

In *Interstate Commerce Commission v. Baltimore & Ohio Railroad Company*, 145 U. S. 263, this court declined to enforce compliance by the carrier with an order of the Commission which required the carrier to cease and desist from charging for the transportation of an individual between certain points a rate of fare greater than it contemporaneously exacted for transporting, over the same line in the same direc-

tion and between the same points, each individual in a party of ten or more under what was called a "party rate" ticket. In this connection the court said:

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable. * * *. (Id. 276.)

VI.

**THE FACT THAT CERTAIN CARRIERS ARE EXEMPTED
FROM THE OPERATION OF THE ORDER OF MARCH 6 DOES
NOT RENDER THE ORDER INVALID.**

In Paragraph XXI of their petition, petitioners call in question the action of the Commission in exempting certain carriers from the operation of the order of March 6, notwithstanding that, as shown by them in said paragraph, Congress conferred upon the Commission in said amendatory act of August 18, 1922, authority to make the exemptions. In this connection, however, we do not deem it necessary to make an extended argument, because counsel for appellees has not even attempted to show that, if appellees are required to comply with the order of March 6, they will be in any way injured by the exemptions.

In *Interstate Commerce Commission v. Chicago, Rock Island & Pacific Railway Company*, 218 U. S. 88, certain carriers objected to action taken by the Commission which did not affect them adversely, and, in declaring the objection to be without merit, this court said:

* * * That the companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his. * * *. (Id. 109.)

VII.

THE ORDER OF MARCH 6 DOES NOT APPLY TO THE TRANSPORTATION OF PASSENGERS WHOLLY WITHIN ONE STATE.

Paragraph XXII of the petition reads as follows:

The aforesaid order of the Commission of March 6, 1923, is unlawful and void because it is not restricted to interstate commerce, but, on the contrary, applies to and includes transportation of passengers wholly within one State. (Rec. 13.)

It is true that the order is not, by its terms, restricted to interstate commerce, but it does not, by its terms, include intrastate commerce, or transportation of passengers wholly within one State. It is further true, however, that the order need not be thus restricted, for the reason that, as shown by section 1 of the interstate commerce act, the jurisdiction of the Commission is not confined to transportation in interstate commerce; it includes also transportation in foreign commerce. Under these circumstances the court will not presume that the Commission intended to make the order apply to matters not within its jurisdiction.

In *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204, this court had before it three paragraphs of section 1 of the interstate commerce act, the provisions of which were not, by their terms, confined to interstate and foreign commerce, and, in applying the rule of construction above mentioned and holding that the

provisions do not include matters which are purely intrastate in character, it said:

If paragraphs 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. Of such a situation this court has said: "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (Id. 217.)

It is clear, we submit, that the order of March 6 is susceptible of a construction which will confine its application to matters within the jurisdiction of the Commission, and we therefore feel certain that the court will not place upon it a contrary construction.

For the reasons above set forth, we insist that the decree of the lower court should be reversed.

Respectfully submitted,

P. J. FARRELL,

For Interstate Commerce Commission,

Appellant.

DECEMBER, 1923.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1923

No. 469

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, NATIONAL COUNCIL OF TRAVELING SALESMEN'S ASSOCIATIONS, ET AL., *Appellants,*
vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, ATLANTIC CITY RAILROAD COMPANY, ATLANTIC & ST. LAWRENCE RAILROAD COMPANY, ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF
MASSACHUSETTS.

BRIEF ON BEHALF OF NATIONAL COUNCIL OF
TRAVELING SALESMEN'S ASSOCIATIONS,
APPELLANT.

This is an appeal from a decision rendered in the United States District Court for the District of Massachusetts, Judge Mack of the Circuit Court, and Judges Morris and Brewster of the District Court, presiding, permanently enjoining an order of the Interstate Commerce Commission in what was known as the Interchangeable Mileage Ticket Investigation.

The Commercial Travelers' Mutual Accident Association of America, Utica, N. Y., an organization affiliated with the National Council of Traveling Salesmen's Associations, while not formally a party, joins in this brief.

AMENDMENT, ORDER OF THE COMMISSION, AND OPINION OF THE LOWER COURT

The order of the Commission was passed pursuant to the amendment to Section 22 of the Interstate Commerce Act, approved August 18, 1922, which provides:

“(2) The Commission is *directed to require*, after notice and hearing, each carrier by rail, subject to this Act, to issue at such offices as may be prescribed by the commission interchangeable mileage or scrip coupon tickets at *just and reasonable rates*, good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The commission *may in its discretion exempt* from the provisions of this amendatory Act either in whole or in part *any carrier* where the particular circumstances shown to the commission shall justify such exemption to be made. Such tickets may be required to be *issued in such denominations as the commission may prescribe*. Before making any order requiring the issuance of such tickets, the commission shall make and publish such reasonable rules and regulations for their issuance and use *as in its judgment the public interest demands*; and especially it shall prescribe whether such tickets are *transferrable, or nontransferrable*, and if the latter, *what identification may be required*; and especially, also to what baggage privileges the lawful holders of such tickets are entitled.

"(3) Any carrier which, through the act of any agent or employe, willfully refuses to issue or accept any such ticket demanded or presented under the lawful requirements of this Act, or willfully refuses to conform to the rules and regulations lawfully made and published by the commission hereunder, or *any person who shall willfully offer for sale or carriage any such ticket contrary to the said rules and regulations*, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not to exceed \$1,000."

Pursuant to this amendment, the Commission instituted an original proceeding on its own motion, and assigned a hearing date (pp. 16-18).

After a full hearing, in which all of the testimony adduced by the parties was considered, the Commission issued its order of January 26, 1923, which read, in part, as follows:

"We find and conclude that on and after March 15, 1923, carriers by rail, respondents herein, enumerated in Appendix C, shall establish, issue and maintain, at such offices as we may hereafter designate, a nontransferrable interchangeable scrip coupon ticket in the denomination of \$90, *which shall be sold at a reduction of 20 per cent from the face value of the ticket. We further find that the rates resulting from that reduction will be just and reasonable for this class of travel.* This scrip coupon ticket shall be good, within one year from the date of its sale, for carriage of passengers on all passenger trains operated by said respondents except that in the case of special or extra fare trains its use will be subject to the payment by the passenger of the special or extra fare. Respondents shall keep a record of the use of the

*Except as otherwise indicated, references are to pages of Transcript of Record. (Italics ours throughout.)

tickets during the first 12-month period which should reflect its effect on passenger revenues, the number of scrip tickets sold, and the gross revenue derived from their sale. Parties other than carriers, primarily interested in this experiment should likewise record their experience with this ticket in order that the actual results of the experiment may be ascertained to the fullest extent possible. *Any party to this proceeding may bring the matter to our attention for further consideration on or about January 1, 1924, with such statements as they choose to make concerning the operation and effect of the scrip tickets.*"

The Judges heretofore named, sitting in the United States District Court for the District of Massachusetts, entered a final decree, and gave an opinion in support of the decree.

The opinion in part stated:

"Although the carriers opposed any reduction in rates for the scrip coupons below the standard rates, it is clear from the record that the commission proceeded on the assumption that *the spirit and theory of the congressional amendment required them to order the scrip coupons to be issued at reduced rates, at least insofar as such rates could not be deemed confiscatory. There is no finding in the record that would indicate that the Commission, if it had exercised an independent judgment apart from what it conceived to be the plain spirit and theory of the amendment, would have ordered the scrip coupons to be issued at reduced rates. The only finding of the Commission that could possibly be relied upon as indicating that the commission exercised an independent judgment is the statement in the majority report that, 'in addition to the obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should*

be established, at least for an experimental period. But this finding is followed by the statement that 'in no other way can the apparent purpose of the law be given practical effect.' It would seem fairly plain, therefore, that the furthest the commission goes in its finding is to conclude that the record might justify the issuance of coupons at reasonably reduced rates for an experimental period; *but there is nothing to indicate that the commission, if it had felt free to exercise its own judgment, would have assumed the responsibility for establishing the reduced rate, even for an experimental period.*

"It is not entirely clear whether the majority of the commission acted under an interpretation of the amendment that it was mandatory upon them so to reduce the rates for interchangeable scrip coupon tickets or upon an assumed desire of the Congress, though not expressed by the amendment in mandatory form, that they should so do. In our judgment, the amendment is not mandatory in this respect. It does not prescribe that such coupons shall be issued at a reduced rate. Attempts to fix specific reduced rates by legislation were defeated. If the Congress had intended that some reduction should be mandatory leaving only the amount thereof to be determined by the commission under the phrase 'just and reasonable,' such intent could readily have been expressed in clear language. The fair and natural interpretation of the language used by the Congress makes mandatory the issuance of such coupons at just and reasonable rates, but the ultimate if not the original determination of what shall be just and reasonable rates for such coupons is placed entirely upon the commission. If, therefore, the commission acted upon a different interpretation of the amendment, an error of law was the basis of its action and order. 'The question is of the meaning of a statute, and upon that, of

course, the courts must decide for themselves.' *Chicago, Milwaukee & St. Paul Ry. Co. vs. McCaull-Dinsmore Co.*, 253 U. S. 97. If, on the other hand, it acted upon the *interpretation which we have found to be the correct interpretation of the amendment*, but based its conclusions not upon its own independent judgment, but upon what it believed to be the spirit and purpose of the act, which, if it means something other than a sound interpretation of the act, must mean some supposed desire of the Congress, *it acted contrary to law in abdicating the functions vested in it.*

"In either case its order is without warrant of law and for this reason must be annulled." (*Italics ours.*)

The Court below sustained defendant in error on but one of the allegations in the complaint. The Court granted the injunction only because it found that the Commission had construed the Act of Congress of August 18, 1922, to require a reduction of rates when the interchangeable mileage or scrip coupon book was sold by the railroad companies, or else the Commission did not exercise its own judgment and acted contrary to law, by abdicating the functions vested in it; the Court held "in either case its order is without warrant of law and must be annulled."

PETITION AND ARGUMENT OF APPELLEES

While the petition contained 24 different sub-heads, the contentions presented by appellees in the lower court were embraced in the following propositions:

1. The Commission has erred in construing the Amendment as intended by Congress to require the carriers to issue interchangeable tickets at reduced rates.

2. The Commission erred in thinking that "this Amendment contemplates that carriers shall be required to recognize an additional class of passenger travel and to provide a special form of ticket which shall be issued at just and reasonable rates fixed by us to cover such travel."

3. In the respect that the Commission's order is an arbitrary and unreasonable discrimination in fares between scrip-coupon passengers and regular-fare passengers, it is beyond the power of the Commission and lacks due process of law.

4. The Act, since it requires one carrier to transport passengers upon the credit of every other carrier, violates the Fifth Amendment, taking the carrier's property without due process of law.

5. The statute is unconstitutional because it delegates legislative power to the Commission without fixing any standard to guide the Commission's actions.

6. The order is void because there was no substantial evidence to support it, and because the Commission's action in making it was arbitrary and beyond its authority.

IT WAS CLEARLY THE EXPECTATION OF CONGRESS THAT MILEAGE OR SCRIP COUPON BOOKS WOULD BE SOLD AT REDUCED RATES.

It is difficult to see how anyone familiar with the history of mileage or scrip coupon books, and with the history of this legislation, can read the amendatory Act without reaching the conclusion that these tickets were expected by Congress to be sold at less than the regular cost of ordinary tickets.

For years prior to June, 1918, mileage books or scrip coupon books had been sold by nearly all of the railroad companies. They covered, as a rule, trans-

portation for 1,000 miles over the road selling, and in many instances over a combination of roads, good for transportation on any of the same. These tickets were sold at reduced rates, varying from 10 per cent reduction to 33 1-3 per cent reduction. In June, 1918, the Director General of Railroads stopped the sale of mileage or scrip coupon books for the purpose, as has been claimed and never denied, of discouraging travel.

Subsection 1 of Section 22 of the Interstate Commerce Act authorized the sale of mileage books at reduced rates, in the following language:

“Section 22. (1) That nothing in this Act shall prevent * * * the issuance of mileage, excursion or commutation tickets.”

Thus in the Interstate Commerce Act the terms “mileage,” “excursion,” and “commutation” were treated in the same way, and as excursion, and commutation tickets were issued at reduced rates it was evident that mileage tickets also were expected to be issued at reduced rates, and were treated as tickets issued at reduced rates.

(The statements of fact contained herein are taken from the Transcript of Record, and were presented as evidence before the Commission, except as they are quoted from the Congressional Record.)

THE HISTORY OF THE LEGISLATION CONFIRMS THE VIEW WHICH WE HAVE SUGGESTED.

Prior to Federal control of the railroads, the standard fare for interstate travel, in a great part of the country, was approximately 2.5 cents per mile, and

for intra-state travel, in many of the states, it was 2 cents per mile. The Director General of Railroads established a minimum rate of 3 cents per mile. In August, 1920, the Interstate Commerce Commission increased the rates 20 per cent, and also allowed the railroads to add a surcharge for Pullman service, this surcharge going not to the Pullman Company, but to the railroads.

In June, 1918, the Director General of Railroads passed an order placing the rate of transportation at 3 cents per mile, and providing that:

"All passenger fares lower than those hereinbefore prescribed, such as mileage, party, second-class, immigrant, convention, excursion and tourist fares, shall be discontinued until further notice, except that tourist fares shall be re-established as prescribed in section 8, paragraph (b) hereof."

Paragraph (b), Section 8, provided:

"Round-trip tourist fares shall be established on a just and reasonable basis bearing proper relation to the one-way fares authorized by this order, and tariffs governing same shall be filed as promptly as possible with the Interstate Commerce Commission."

Scrip coupon books were subsequently issued and used to a very limited extent, at standard rates, but what were generally known as mileage books and scrip coupon books were those issued at reduced rates prior to June, 1918.

Subsequently, and after the period of Federal control, the railroads returned to their practice of issuing tourist tickets, excursion tickets, resort tickets, convention tickets and commutation tickets at substan-

tially reduced rates, and while mileage books and scrip coupon books had been recognized as in the same class as excursion tickets, tourist tickets, resort tickets, convention tickets and commutation tickets, to be sold at reduced rates, the railroad companies have never restored this practice.

While excursionists, resort visitors and tourists were still given rates at from 20 to 33 1-3 per cent less than the standard fare, and while those living near large cities were sold commutation tickets at greatly reduced rates, the men who were compelled to travel the country over, great distances each year, on account of their business, and who had prior to June, 1918, been sold mileage or scrip books at reduced rates, were receiving no recognition whatever.

A man who went from Chicago or Boston to Miami, Florida, as a resort visitor could have six months in which to return, selecting his own time, during that period, when he would return. The tourist could obtain his ticket to Los Angeles, with practically no restrictions. But the traveling salesman, whose business required him to travel just as many or more miles, and the business or professional man, who was required to do extensive traveling, after June, 1918, received no such right as was given by the issuance of mileage or scrip books prior to June, 1918.

It was this condition which confronted the Congress meeting in December, 1921. There was demand from all over the country for restoration of the mileage or scrip coupon book in use prior to June, 1918, and the mileage or scrip coupon book meant a book providing for 1,000 or more miles of transportation at reduced rates, the reductions ranging, according to past practices, from 10 to 33 1-3 per cent. A mileage or scrip coupon book was understood to mean just as definitely

a book at a reduced rates as the excursion ticket, the resort ticket, the tourist ticket or the commutation ticket.

It was this situation which brought the question so forcibly to the attention of Congress, and the amendment under which the Commission is acting was passed with practical unanimity by both Houses of Congress.

Fourteen bills were introduced in Congress providing for mileage or scrip coupon books. The bills named rates of reduction from the 3.6-cent rate, ranging from 10 to 33 1/3 per cent.

In the Senate, bills providing for mileage books at reduced rates were introduced by Senators Watson, of Indiana; Robinson, of Arkansas; McKellar, of Tennessee; Spencer, of Missouri; Harris, of Georgia, and others; and in the House of Representatives, similar bills had been introduced by Representatives Kahn, of California, Barclay, of Kentucky, and others.

The bills in the Senate were referred to the Committee on Interstate and Foreign Commerce, which was very much crowded with work, and by unanimous consent, on the motion of Senator Robinson, the Committee was relieved of the consideration of the bill introduced by Senator Watson, of Indiana, and a time was named for the consideration of the bill in the Senate.

In connection with the unanimous consent, Senator Robinson offered quite an elaborate statement on mileage books. The entire subject was dealt with in this statement upon the theory that mileage books carried rates reduced from the standard rates.

With reference to this measure, the following extracts are given from expressions by senators.

Senator Cummins, Chairman of the Committee on Interstate and Foreign Commerce, who opposed legis-

lation which would take from the Interstate Commerce Commission the duty of fixing the rate on interchangeable mileage books, and whose substitute for the numerous bills fixing specific reductions of rates was adopted by the Senate, made the following statement in support of his substitute, which appeared in the Congressional Record of January 19, 1922:

"It must be observed from what I have stated that I do not approach the discussion of this question in a hostile spirit. I mean, I recognize the demand which the commercial travelers of the United States have made for this form of transportation, and I am not prepared to say that they should not have the privilege of buying transportation, at wholesale at lower rates than the person who buys a specific ticket for a particular journey. In so far as the selling of transportation in this way and in so far as all the operations which are connected with that transportation are concerned which tend to reduce the cost of the service, the Interstate Commerce Commission may very well, in my judgment, establish a lower rate per mile than the ordinary rate which is now in force or which may be in force at any given time."

Senator McKellar said:

"Mr. President, the necessity of this legislation, it would seem to me, would be obvious to anyone.
* * * We are not seeking, Mr. President, to put any new or untried policy upon the railroads. We are simply readopting that wise policy which the railroads themselves had followed for many years prior to Government control. * * * It is, in either respect, obviously for the best interests of the railroads. The undisputed proof is that business firms have had greatly to decrease their number of commercial travelers because of

the excessive rates. * * * Every time a drummer sells a bill of goods for his house, he also sells transportation to the railroads; not only his own transportation, but transportation for the goods which he sells * * *. Under these circumstances, it seems to me a badly misguided self-interest on the part of the railroads when they do not welcome the sale of mileage books. * * * The books will undoubtedly bring about an increase of travel, and for the same overhead greater revenues could be made from a lower passenger rate."

Senator Cummins, who opposed the flat reduction of one cent per mile by Congressional action, and favored leaving to the Commission the responsibility of fixing the rate, said:

"I am assuming that men who ride on trains are ordinarily intelligent, and while they could easily perceive the justification for some difference in the rate, they would not be able to perceive the reason for the difference of one cent per mile in the rate."

Senator Poindexter said:

"It is objected that the bill is class legislation, in the interest of traveling men, or commercial travelers, as they are called. I fail to see upon what that objection is based, inasmuch as this special rate mileage ticket is purchasable by any one who chooses to take advantage of it."

He then called attention to a ticket voluntarily being sold by the railroads; an all-year-round tourist ticket, from Chicago throughout the West to the Pacific Coast and return, and said:

“The ticket is good for nine months, and the rate per mile is 2.4 cents, which is a lower rate than that which is provided for in the pending measure.”

A substitute for all of the bills which attempted to fix the rate at which mileage books were to be sold, had been generally agreed upon by senators, and Senator Lenroot said, with reference to the substitute, which was not changed in the House of Representatives, so far as it affected the question of rates:

“I have long been interested in the subject of securing interchangeable mileage books. * * * Under it, if the House will agree, it is assured that interchangeable mileage books will be compelled by the Interstate Commerce Commission to be issued, and at a substantial reduction, because there can be a substantial reduction without loss of revenue from the existing single fare rates.”

Among other things, Senator Robinson, discussing the question of mileage or scrip coupon books in general, said:

“Let me turn briefly to a consideration of what I believe will be the reasonable effect of this legislation. First, it will tend to stimulate travel. The railroad executives of the country do not seem to realize that by the maintenance of both excessive passenger and freight rates business which ordinarily should be conducted on the railroads is being diverted to other instrumentalities.”

He then pointed out the increasing use of automobiles in passenger and freight traffic, and continued:

“The reason in part for it is that both passenger and freight rates are too high on the railroads. If freight rates were reduced * * * it would probably promote more business and

yield more revenue than the railroads are now receiving, and the same is true of passenger rates.

"I know that thousands of cases exist where business is being discouraged, retarded and hampered * * * by reason of the very excessive rates.

"I know that thousands of traveling men in the United States * * * have left the road. Some drummers are traveling in automobiles and some are staying at home, for the reason that the passenger rates which they are compelled to pay have discouraged their employers, and have induced them to adopt a restrictive policy in their business."

It is true that some of the members of Congress objected to the bill because it did not definitely require the Commission to issue the ticket at a reduced rate, but no doubt was expressed that under the evidence which would be produced, the Commission would make a reduction in the rate.

THE ACT FURNISHED MACHINERY FOR A MILEAGE OR SCRIP COUPON BOOK TO BE ISSUED AT LESS THAN STANDARD RATES.

This amendatory act required the Commission to direct the railroads to issue mileage or scrip coupon books, and it is difficult to see how anyone could doubt, from the statements made by the Chairmen of the Committees in charge of the legislation in Congress, by the leaders who discussed the subject, and from the language of the amendment itself, that Congress expected these tickets to be issued at a rate less than the standard rate.

There are a number of provisions in the amendment which clearly show the purpose and spirit of the Act

was to furnish machinery for tickets issued at reduced rates.

The Commission was directed to require interchangeable mileage or scrip coupon books at just and reasonable rates.

The interchangeable mileage and scrip coupon tickets had been customarily issued at reduced rates; the very name indicates a ticket to be sold at a reduced rate.

The railroads were at the time issuing a scrip coupon book at a 3.6-cent rate. There was no occasion for the legislation unless the books were expected to be issued at reduced rates.

The Commission was to determine the denominations of these tickets. This was because the size of the tickets would affect the rates.

The Commission was to make rules and regulations for their issuance as in its judgment the public interest demanded, and especially to prescribe whether the tickets should or should not be transferable. This was because the tickets were expected to carry some reduction in price, and if not transferable identification of the party to whom issued should be required.

What the public interest demanded, the nontransferable character of the ticket, the identification of the holder; all of these provisions were logically connected with a ticket sold at a reduced charge. They were worth nothing to the railroad companies or the public unless the tickets were sold at reduced prices.

But perhaps the strongest feature of the amendment, showing that the tickets were expected to be sold at reduced prices is the provision making it a misdemeanor for any person willfully to offer for sale or carriage any ticket, contrary to the rules and regulations fixed by the Commission. *It was to enable the*

Commission to provide a ticket at reduced rates and to make it nontransferable that provision was required to prevent scalpers from handling these tickets, and also to prevent an offer to use by anyone except the original purchaser.

All these safeguards were provided in order that the Commission might direct the issuance of mileage or coupon books at reduced rates.

We submit with great confidence that this Act authorizes the conclusion that "the obvious spirit" and the "apparent purpose of the law" was that the mileage or scrip books would be required by the Commission to be issued at less than the standard rates.

THE COMMISSION IN NO SENSE ABDICATED THE FUNCTIONS VESTED IN IT

The lower court failed to observe a number of statements in the opinion of Commissioner Meyer which show clearly that the Commission did not abdicate its functions, but passed definitely upon the question of what were just and reasonable rates for these tickets.

Among the questions propounded by the Commission upon which evidence was invited, was:

"2. What rate or rates shall be established as just and reasonable for each or either form of ticket?"

Referring to the Act, Commissioner Meyer said:

"The amendatory act affirmatively directs us to require, after notice and hearing, each carrier by rail subject to this act to issue, at such offices as may be prescribed by us, interchangeable mileage or scrip coupon books at 'just and reasonable

rates, good for passenger carriage upon the passenger carrying trains of all carriers by rail subject to this Act.' * * *

"The Act is MANDATORY in that it directs us, after notice and hearing, to require each carrier by rail subject to the Act to issue interchangeable, mileage or scrip coupon tickets. It is DISCRETIONARY in that we may prescribe either an interchangeable mileage ticket or a scrip coupon ticket. IT IS ALSO LEFT TO OUR JUDGMENT TO DETERMINE, AFTER NOTICE AND HEARING THE JUST AND REASONABLE RATES AT WHICH THE FORM OF TICKET PRESCRIBED SHALL BE ISSUED.

*" * * * The amount of the rate is the most important question before us in this proceeding. * * *"*

The lower court entirely ignored the statements in the opinion of Commissioner Meyer, which clearly point out that the Act was mandatory in that it directed the issuance of the interchangeable mileage or scrip coupon ticket, but that it left to the judgment of the Commission the determination of what would be "just and reasonable" rates.

The further statement is made in the opinion of the Commission that:

*"The amendment contemplates that carriers shall be required to recognize an additional class of passenger travel and to provide a special form of ticket which shall be issued at just and reasonable rates fixed by us to cover such travel. The greatest users of this class of travel, if available at rates lower than the standard rates, will undoubtedly be commercial salesmen, business men, professional men, and others who make frequent trips. * * *"*

Here again the Commission declared that the just and reasonable rates were to be fixed by the Commission.

The Commission declares that the amendment contemplates the recognition of an additional class of passenger travel for which they are to provide special forms of tickets, at just and reasonable rates fixed by the Commission. There can be no doubt that persons traveling 2,500 miles a year can be classified as passengers distinct from those who travel 10, 100, or even 500 miles a year.

The Commission added that the greatest users of this class of travel, if available at rates lower than the standard rates, will undoubtedly be commercial salesmen, business men, professional men, and others who make frequent trips. The Commission had just stated that the just and reasonable rates were to be fixed by it, and clearly they held that it was left to them to determine whether the rates were to be lower than the standard rates.

The language used by the Commission also clearly indicated by the use of the words "if available at rates lower than the standard rates," that the Commission did not consider itself compelled to fix a lower rate for this class, but fully recognized that the rate was to be fixed by the Commission.

Commissioner Meyer further said, expressing the opinion of the majority of the Commission:

"The spirit and apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare, *which would be just and reasonable because it would be sold in such quantities as to stimulate travel*, and thereby increase net revenue or at least offset any

loss in revenue that might result from the reduction, in which event the carriers would render greater service to the public. It is a well recognized rule in trade and commerce that, other things being equal, as the price of an article is lowered the sales increase. And the fact that for many years prior to Federal control carriers voluntarily sold mileage books at discounts ranging from 10 to 33 11-3 per cent is not without significance."

The Commission, in referring above to the spirit and theory of the law, did not in any sense mean that the Commission was required to make a reduction in the rate on the tickets unless the Commission found such reduction would be just and reasonable.

The Commission had expressly stated, just prior to this in their opinion, that, while the Act directed them to require the railroad companies to issue the mileage book or scrip coupon book, it was left to the Commission to determine the rate, and to determine what was just and reasonable. So that the language referring to the spirit and theory of the law could only have presented the view of the Commission as to what Congress anticipated would be the result of action by the Commission, performing its duty of investigation and determination of what would be just and reasonable.

This is further sustained by the fact that the Commission proceeded thereafter to make the investigation and to determine themselves what would be a just and reasonable rate.

The Commission itself approved what it said was the spirit and theory of the law, and found that some reduction in the standard fare on this ticket would be just and reasonable, because:

"It would be sold in such quantities as to stimulate travel and thereby increase net revenue or at least offset any loss in revenue that might result from the reduction, in which event the carriers would render greater service to the public."

There was nothing inconsistent in the Commission's making this independent finding for itself, and at the same time referring to the evident spirit and theory of the act as indicating that such a reduction would be made.

The Commission nowhere stated that the reduction was made because of the apparent spirit and theory of the Act.

They were fully justified by a consideration of the Act in finding that the spirit and theory of the Act showed a reduction of rates was anticipated.

They were fully justified by the evidence submitted to them in finding, independent of the spirit and purpose of the Act, that it was just and reasonable to issue these tickets with the reduced rate. Indeed, to have done otherwise would have been entirely unjust and unreasonable.

Commissioner Meyer further said:

"In addition to the obvious spirit of the law, *the record warrants the view that a coupon ticket at a reasonably reduced fare should be established*, at least for an experimental period. In no other way can the apparent purpose of the law be given practical effect."

This was the paragraph quoted by the lower court, upon which its conclusion was based that the Commission misconstrued the Act of Congress and "abdicated its functions;" failing to determine for itself that the "reduction was just and reasonable."

The Commission expressly declared that the record warranted the view that a coupon ticket at a reasonably reduced fare should be established. This one extract from the opinion of Commissioner Meyer, if considered alone, was inconsistent with the conclusion of the lower Court.

The Court, in referring to this language of the Commission, says that the Commission found the record "might justify" the view that a coupon ticket at a reasonably reduced fare should be established. The Commission found nothing of the kind. They did not use the words "might justify." They definitely found that "the record warranted" a coupon ticket at a reasonably reduced fare.

But following this expression was the final conclusion of the Commission in which they definitely determined that the rate reduction prescribed "will be just and reasonable for this class of travel."

Commissioner Meyer said:

"We find and conclude that on and after March 15, 1923, carriers by rail, respondents herein, enumerated in Appendix C, shall establish, issue and maintain, at such offices as we may hereafter designate, a nontransferrable interchangeable scrip coupon ticket in the denomination of \$90, which shall be sold at a reduction of 20 per cent from the face value of the ticket. *We further find that the rates resulting from that reduction will be just and reasonable for this class of travel.*"

The opinion of Commissioner Meyer went fully into the question and discussed the evidence, and a majority of seven of the Commissioners fixed 20 per cent as the reduction which would be just and reasonable. If the Commission had simply acted upon the theory that

the amendment required a reduction, they were perfectly free to have made a reduction of very much less than the 20 per cent. The fact that they fixed 20 per cent as the amount of the reduction was a determination by the Commission of what they considered just and reasonable, and it is hardly fair to the Commission to suggest that they abdicated their functions.

If they had not found that 20 per cent was a just and reasonable rate, and the proper rate at which to inaugurate the use of the coupon mileage book, they could have made that rate 10 per cent or 5 per cent.

The further fact that the Commission made this order, in effect, an experimental reduction, shows they were exercising their own judgment without reference to the spirit and theory of the Act, for they reserved the right to lessen the reduction, or even to remove it, if subsequently, by the experiment, it was found just and reasonable that this should be done.

We have shown that the very passages relied upon by the lower Court are inconsistent with its decision, and that the passages it seems to have ignored show clearly that the Commission acted recognizing that it was free to fix *any* rate which would be just and reasonable.

The answer of the Commission, sworn to by Commissioner Meyer, emphasizes the course pursued by the Commission. In it, it is stated:

“That said findings, conclusions, rules and regulations were and are, and each of them was and is fully supported and justified by the evidence submitted to the Commission in said proceeding as aforesaid. * * * The Commission considered and weighed carefully, in the light of its own

knowledge and experience, every fact, circumstance and condition called to its attention.

"The Commission further alleges that the rate at which the carriers named in said order of March 6 are required to establish, issue, maintain, and keep in force, the nontransferrable interchangeable scrip coupon ticket referred to in said order, will furnish to the carriers covered by the order including the petitioners herein, full, reasonable, fair, and just compensation for services to be performed by them and included in said rate, and denies each of and all the allegations to the contrary contained in said petition."

We submit that a fair consideration of the action of the Commission shows that the Commission considered all the facts submitted, and found that it was only just and reasonable the script coupon ticket should carry a reduced rate. The Commission definitely determined what that reduced rate should be, the final conclusion of the Commission having been that the 20 per cent reduction was just and reasonable and should be put in force.

THE EVIDENCE BEFORE THE COMMISSION FULLY JUSTIFIED ITS ACTION

On August 25, 1922, the Commission issued an order providing for the investigation, in pursuance of the Act of August 18, 1922, amending Section 22 of the Interstate Commerce Act, known as the Interchangeable Mileage Ticket Investigation.

Notice of the investigation was given, much evidence was introduced before the Commission, and the order complained of was passed by the Commission, providing for nontransferable scrip coupon tickets covering 2,500 miles, at 20 per cent discount from the regular rates.

The coupon ticket was adopted as a matter of convenience, to facilitate the execution of that part of the order which provided that in the case of special or extra fare trains, its use should be subject to the payment by the passenger of the special or extra fare.

It appeared in the hearings before the Commission that many business houses were curtailing the number of traveling salesmen upon the road, on account of the high rate for passenger transportation.

The Transcript of Record, from pages 237 to 284, gives evidence upon this subject, and shows clearly that the use of a mileage or scrip coupon book at a reduced rate would enormously increase the number of those occupying cars of the railroad companies, also that this increase of travel would result in no substantial increase in operating cost to the railroad companies.

The size of the ticket was made 2,500 miles. It is not a ticket suited to general use, but only to a particular class, those who travel 2,500 miles or more a year, as distinct as those classes to which the railroads are now voluntarily giving reduced rates.

The Commission among other things said:

“It is a well-recognized rule in trade and commerce that, other things being equal, as the price of an article is lowered the sales increase. And the fact that for many years prior to Federal control carriers voluntarily sold mileage books at discounts ranging from 10 to 33 1-3 per cent is not without significance. That commutation and excursion fares created traffic is conceded by carriers. * * *”

It is true that the Commission stated there was no evidence which proved the mileage books used *in*

the past stimulated travel. But they called attention to the testimony which indicated clearly that this ticket would stimulate travel, *in the future*, and this fact was overwhelmingly shown by the evidence before the Commission.

The Commission then points out that

“The testimony of merchants, manufacturers, and commercial travelers is to the effect that an interchangeable mileage ticket at reduced fares would result in a greater number of salesmen being put on the road. And, of course, the use of such a ticket would not be restricted to commercial travelers and business men.”

The Commission further stated that the average number of passengers per train, which in 1916 was only 57, increased gradually thereafter until *in 1919 it was 82*, but decreased rapidly after the rate of fare was increased 20 per cent in August, 1920, until for the first six months of 1922 *it was only 60*; that during the same time the average number of passengers per car, which in 1916 was 16, increased gradually until in 1919 it was 21, but for the first six months of 1922 was only 15; that the revenue passenger miles which in 1916 totaled 34,586,000,000 increased gradually thereafter until in 1919 they were 46,358,000,000, but for the first six months of 1922 were only 16,487,000,000; that the carriers now have in effect commutation, convention, excursion and summer and winter fares which are less in each instance than the standard fare; that the carriers now have in effect an interchangeable scrip coupon ticket, in denominations of \$15, \$30 and \$90, which they sell at the rate of fare of 3.6 cents per mile, and there is evidence in the record which was before the Commission to the effect that carriers now sell

tourist and summer and winter excursion tickets at rates of fare which are 33 1-3 per cent less than said standard rate of fare.

The claim by the appellees that, from the increase of travel induced by the scrip coupon book ordered by the Commission there should be deducted the entire average cost to the railroads of hauling passengers cannot be sustained. The number of passengers per car was 16 in 1916 and 21 in 1919, but for the first six months of 1922 it was only 15, and the revenue passenger miles had decreased from 34,586,000,000 in 1916 to 16,487,000,000 during the first six months of 1922.

The passenger cars were therefore being hauled with a much less number of passengers than they were made to accommodate. The addition of passengers in these cars could take place with no addition of cost to the railroad companies. One additional passenger per car, furnished as a result of this scrip coupon book, would more than compensate the railroad companies for the reduction of fare.

It is erroneous to claim that the standard transportation rate as established by the 20 per cent increase allowed by the Commission in 1920 puts the standard fare at 3.6 cents per mile. The increase was 20 per cent on all fares, including reduced fares as well as the 3 cent fare allowed by order of the Director General.

When we take into consideration the amount of travel on commutation, convention, excursion, tourist and other forms of reduced rate tickets, the average per mile charged by the carriers was little more than the amount which will be required under the scrip coupon book with the 20 per cent reduction.

The appellees have insisted that the Commission found the operating ratio for passenger service at

the present rate of 3.6 cents per mile to have been, for the first six months of 1922, 85.24 per cent, and that therefore it cost the carriers 3.06 cents per mile to transport each passenger.

This line of argument of appellees is based solely upon the theory that each passenger paid 3.6 cents per mile. It leaves entirely out of consideration the fact that large numbers of commutation and other reduced rate tickets were sold.

It appears from the record that, for the first six months of 1922, the gross passenger revenue of appellees was approximate \$500,000,000. It appears also that the revenue passenger miles were shown to be 16,487,000,000 for that year. Dividing the gross passenger revenue by the mileage gives 3.03 cents instead of 3.6 cents, as the average rate paid per passenger mile. *Applying the operating ratio of 85.24 per cent, to the actual average rate paid per passenger mile, 3.03 cents, gives the expense per passenger mile to the railroads 2.58 cents instead of 3.06 cents. So that the rate now fixed by the Commission of 2.88 cents per mile is substantially above the average expense per passenger per mile to the railroads.*

Again we call attention to the fact that, in 1922, a large amount of space in the cars hauled was unoccupied, and the increased travel caused by this scrip coupon book will reduce materially the average expense per mile to the railroads from the haul. Their increased travel will be practically net to them.

The evidence justified the conclusion that the ticket required by the Commission would probably increase the revenues of the railroads. It would certainly be of great service to the public, and increase the freight handled by the railroad companies. From the entire evidence, the Commission could correctly form the

conclusion that the reduced rate was just and reasonable. (An appendix showing the character of the evidence investigated by the Commission is hereto annexed.)

JURISDICTION WHICH THE COURT WILL EXERCISE TO CONTROL ACTION BY THE COMMISSION.

In *Proctor & Gamble vs. U. S.*, 225 U. S. 282, 56 L. E. 1091, the Court placed definite limitations upon the jurisdiction to be exercised in cases like that now under consideration.

Chief Justice White delivered the opinion as follows:

"Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred, although it may be not technically doing so. *Interstate Commerce vs. Union P. R. Co.*, 222 U. S., 541, 547; *Interstate Commerce Commission vs. Illinois C. R. Co.*, 215 U. S., 452, 54 L. E. 280."

In the case of *Interstate Commerce Commission vs. Union P. R. Co.*, cited by the Court in the *Proctor & Gamble* case, *supra*, the Court held, first that the

Courts will not examine the facts on which the Interstate Commerce Commission based its order reducing rates further than to determine whether there was substantial evidence to sustain the order, and further that the Commission cannot be said to have based its order reducing rates on a mistake of law in regarding the long maintenance by the carriers of a lower rate while earning dividends as raising a presumption of reasonableness, where the reduced rate fixed by the Commission was higher than such earlier rate.

In this case the Court said:

“In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. *It will not consider the expediency of the order, or whether on like testimony it would have made a similar ruling.*”

In *Interstate Commerce Commission vs. Louisville & N. R. Co.*, 227 U. S. 88, 57 L. E. 437, Mr. Justice Lamar said:

“The order of the Commission restoring a local rate that had been in force for many years, and making a corresponding reduction in the through rate, was not arbitrary but sustained by substantial, though conflicting evidence. The Court cannot settle the conflict nor put their judgments against that of the rate-making body.”

In the case of *I. C. C. vs. Atchison, T. & S. F. R. Co.*, 234 U. S. 476, 58 L. E. 1408, the Court said:

“The argument for the petitioner necessarily invites the Court to substitute its judgment for that of the Commission upon matters of fact

within the Commission's province. This is not a function of the Court."

In *Baltimore & Ohio R. Co. vs. U. S.*, 521 U. S. 481, the Court said:

"Whether a rate is reasonable is a question of fact, not of law, and the opinion of the Interstate Commerce Commission is conclusive."

This Court has often ruled that it will not pass upon the weight of the evidence or the wisdom of the order of the Commission. It will only interfere when it is impossible to say that a fair-minded Commission would not have reached the conclusion stated. In the present case not only was the order of the Commission sustained by the evidence, but the order allowed any one of the carriers to appeal to the Commission for modification of the same, even to the extent of being excepted from the order.

THE COMMISSION'S ORDER IS NOT AN ARBITRARY AND UNREASONABLE DISCRIMINATION IN FARES BETWEEN SCRIP COUPON PASSENGERS AND REGULAR FARE PASSENGERS. IT WAS WITHIN THE POWER OF THE COMMISSION, AND DOES NOT LACK DUE PROCESS OF LAW.

In support of their contention No. 3, appellees urged that the 2,500 mile ticket at a 20 per cent reduction was an advantage given to a traveler who had \$72 with which to purchase the ticket, and it was therefore discrimination against the man who did not have that much to pay, and who paid more per mile for his transportation.

This view is an entire misconception of the ticket authorized by the Commission. The average man in the United States does not travel even 250 miles per year. He does not invest \$72 in transportation to be used up in twelve months, because he does not intend to travel any such distance in twelve months. The 2,500-mile ticket is intended for those as a class who will travel great distances each year.

Many traveling salesmen will use several of these tickets during the year, and especially as they can be obtained at a reduced rate. The cars of the trains have not been hauled full of passengers. The increase of travel brought about by this ticket will be with little or no additional cost to the railroad companies.

While the Act requiring the mileage or scrip coupon books is not limited to traveling salesmen, the evidence disclosed the fact that this class of travelers would be the chief users of this ticket. To their number will be added business men or professional men whose business furnishes a reason for extensive travel, and to claim that it applies simply to a class who can afford to invest \$72 is entirely without merit.

The visitors from Boston, New York and Chicago to Miami, Florida, and return, are men of wealth, and yet they are given a greater concession on their rates than is given to the purchaser of these coupon books. They go to luxuriate in a climate of perpetual sunshine, while the traveling salesman and the business and professional man who will buy the 2,500-mile ticket is a working man, contributing by his work to the general prosperity of the country. The tourist goes for pleasure. He as a rule is a man of large means, yet he receives a greater concession in the reduction of his transportation than is given by this ticket to the traveling salesman and the business and professional man.

It is contended by appellee that commutation, convention, excursion, and tourist fares are clearly distinguished from the form of ticket here ordered, and enable the carriers to perform the transportation in volume and at reduced rates. This may be true as to commutation and convention tickets. It certainly is not true as to tourist tickets and resort tickets such as those discussed above. During a six months' period, they travel on reduced rate tickets from Boston, New York and Chicago to Miami, Florida. Visitors to these resorts go when they please, and return when they please. The tourist goes when he pleases and returns when he pleases. There can no more be special provision for transporting those traveling on these reduced rate tickets than there can be for those traveling on the scrip coupon books provided for in the order of the Commission.

It should also be borne in mind that the commutation, convention, excursion and tourist travelers who nearly all buy their transportation at reductions substantially less than the 20 per cent reduction provided for in these scrip coupon books, ride in the same cars with passengers who pay the 3.6 cents per mile.

There are some concession tickets, such as those given to conventions for which special preparation can be made by the railroad companies, but the large majority of the tickets sold with substantial concessions have no such element connected with them, and this contention of appellees is without merit.

The commutation tickets given to and from the large cities into the suburbs require a special service. The engines and cars provided for them must be kept ready and are used only for a few hours. There must be extra labor to handle this equipment. They carry a heavy overhead charge on account of the fact that

they use terminals built at great expense and frequently elevated tracks or facilities requiring terminals. These trains place an expense upon the railroad companies much greater than that of the ordinary passenger train moving away from the city upon main lines or branches.

Yet the railroad companies sell this transportation often at not one-half the cost of 3.6 cents per mile ticket, and the volume of business compensates for the low rate.

While the Commission balanced the value of the money which would be left with the railroads as an incident of the purchase of a 2,500-mile book, against the increased expense to the railroads of issuing the scrip coupon book, we insist that the estimate of length of time for which the money would be in the hands of the railroads is not sufficiently great. It was based upon the 1,000-mile books used in former times. This book is two and a half times as large and the railroad companies will have the money much longer. A large part of this money will remain with the railroads an average of three months, instead of an average of two months. A considerable portion will remain with them an average of six months. Indeed, practically all of that paid by those other than traveling salesmen will remain with the railroads an average of six months.

But, in addition to this, it should be borne in mind that the reduced rate tickets now sold by the railroad companies involve substantial expense. There are highly paid representatives of the railroads who solicit this business, and large sums of money are paid for advertising these special rates. We cannot take a daily or Sunday newspaper without finding in it excursion rates offered, in many instances at less than half the usual rate. None of this class of expense will be incident to the scrip coupon book.

The difference between the travel on a 2,500-mile ticket and that on an ordinary straight fare ticket is greater than that between those to whom reduced rates are being voluntarily furnished by the railroads and those of the ordinary straight fare ticket travelers.

Differences in Rates Charged Passengers Have Been Expressly Provided for in the Interstate Commerce Act, and Have Been Approved By the Courts.

The principle of equality between passengers which is required is equality under substantially similar circumstances and conditions, for like service. The true principle of equality should recognize that different allowances or different charges should be made for passengers, varying according to service and conditions. True equality is reached by varying charges as required by varying conditions.

In the case of *Interstate Commerce Commission vs. Baltimore and Ohio Railroad Co.*, 145 U. S. 263; 36 L. E. 699, a distinction between the sale of tickets to a class at reduced rates and the sale of a single ticket is fully recognized.

The Baltimore & Ohio Company had sold a party-rate ticket covering the transportation of ten or more persons from one place to another, at the rate of 2 cents per mile, when 3 cents per mile was the regular rate for passengers.

The opinion in this case is most interesting and comprehensive. The Court ruled that:

“Railway companies are only bound, under the Interstate Commerce Act, to give the same terms

to all persons alike under the same conditions and circumstances, and in carrying large parties an inequality of condition and change of circumstance justifies an inequality of charge."

This opinion abundantly refutes the claim by appellees that the 20 per cent reduction is an unjust discrimination. The following language is used, referring to the Interstate Commerce Act:

"In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. * * * The testimony indicates that for many years before the passage of the act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, trips for long distances, trips in parties of ten or more, lower than the regular single fare charged between the same points, and such lower rates were universally made at the date of the passage of the Act. As stated in the answer, *to meet the needs of the commercial traveler the 1,000-mile ticket was issued*. To meet the needs of the suburban travelers several forms of ticket were issued. * * * In short *it was an established principle of the business that, whenever the amount of travel more than made up to the carrier for the reduction per capita then such reduction was just and reasonable* both in the interest of the carrier and of the public. * * * If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single trip passenger would gain absolutely nothing."

In this case the Supreme Court sustained a ticket which reduced by one-third the charge for parties of ten as compared with the ordinary charge placed upon a single person. The Supreme Court declared that the Interstate Commerce Act permitted the selling

at wholesale cheaper than at retail. A ticket for ten persons for a short distance did not make the wholesale feature of the ticket equal to the requirement, in the present case, that the ticket should be for 2,500 miles. In this case the reduction allowed is only 20 per cent, while the reduction on the party ticket was 33 1-3 per cent.

The attack upon the proposed legislation and upon the proposed order issuing these books at a cost less than the standard fare has been largely based upon the case of *Lake Shore & Michigan Southern Railroad Company vs. Smith*, 173 U. S. 684.

In that case the state of Michigan had undertaken to put into effect a measure requiring the railroad, when the ordinary fare was three cents a mile, to issue an interchangeable 1,000-mile book at two cents a mile, good for every member of the family of the man to whom issued, the ticket to continue good for two years when commutation tickets had never been issued for longer than one year, and the railroads were required to redeem the books if any part had not been used.

The Supreme Court held that with all these detailed requirements the Act was unconstitutional. Three judges of the Supreme Court dissented at the time. Mr. Justice McKenna, alone, of those upon the bench at the time, is still upon the bench, and he was one of the three who dissented.

In the *Lake Shore* case, the Supreme Court, among other things, questioned the propriety of giving to a class a rate different from the ordinary rate given to all persons. It questioned the propriety of giving a lower rate to tickets sold at wholesale from those sold at retail. The opinion dwelt upon the fact that the ticket was to be good for all the family of the holder,

and was to be good for two years, and that the unused portion of the ticket was to be redeemed.

The opinion in the *Lake Shore* case has not been followed by the Supreme Court in subsequent cases, but has been criticised, discredited, and, in part, set aside.

In the case of *Arkadelphia Milling Co. vs. St. Louis S. W. R. Co.*, 249 U. S. 134; 63 L. E. 517, a rate was made, lower than the standard rates, on rough material going to companies which later shipped finished products, upon the ground that it made an unjust discrimination against shippers who did not ship the specific percentages of the finished product from the lines, the lower rate having been given only to those shippers who furnished a certain percentage of the manufactured product over the lines of the same carriers. The railroad company sought to enjoin the maintenance of the lower rate.

The Supreme Court said:

“This schedule (i. e., of rates on rough materials) was established in the exercise of the legislative authority of the state, and could not be set aside by the court on the ground of discrimination unless it amounted to a denial of the equal protection of the laws guaranteed by the 14th Amendment.

“But there is nothing to show that the rough material rates wrought any discrimination against the railway companies. They were applicable upon all railways alike. If there was—not in the least intimating that there was—undue discrimination as against small shippers or those who had no occasion to obtain transportation for the manufactured product over the line of the same carrier, this was not a matter of which the railroad companies could complain. It is most thoroughly established that before one may be heard to strike

down state legislation upon the ground of repugnancy to the Federal Constitution, he must bring himself within the class affected by the unconstitutional feature. *Plymouth Coal Co. vs. Pennsylvania*, 232 U. S., 531, 544, 58 L. E., 713, 719; *Jeffrey Mfg. Co. vs. Blagg*, 235 U. S., 571, 576, 59 L. E., 364, 368; *Mallinckrodt Chemical Works vs. Missouri*, 238 U. S., 41, 54; 59 L. E., 1192; *Thomas Cusack Co. vs. Chicago*, 243 U. S., 526, 530, 61 L. E., 472, 475.

"*Lake Shore & M. S. R. Co. vs. Smith*, 173 U. S., 684, 43 L. E., 858, did not set aside this established principle. The discrimination in favor of certain patrons, there referred to, was laid hold of rather as showing the unreasonable character of the regulation. *The authority of that case is not to be extended. Louisville & N. R. Co. vs. Kentucky*, 183 U. S., 503, 511, 46 L. E., 298, *Pennsylvania R. Co. vs. Towers*, *infra*."

This decision not only limits the authority of the *Lake Shore* case, but it also decides that the alleged discrimination against ordinary passengers by this order is not a matter of which the railroads could complain, and that the railroad companies could not strike down the order upon the ground of its repugnancy to the Federal Constitution, not having brought themselves within the class affected by the alleged unconstitutional feature; and furthermore that a differentiation in rates because of distinctions in condition and circumstances is justified.

In *Pennsylvania Railroad vs. Towers*, 245 U. S. 6, the Court overruled, in part at least, the decision in the *Lake Shore* case, and declared that such parts of that decision which were in conflict with the views presented should be considered as overruled.

In the *Towers* case the Court cited 145 U. S. 263, the case of the *Interstate Commerce Commission vs. Bal-*

timore & Ohio Railroad. In that case the Court held that a party rate ticket for the transportation of ten or more persons at a rate less than that charged a single individual did not make a discrimination against an individual, charged more for the same service, or amount to unjust or unreasonable discrimination within the meaning of the Act to Regulate Commerce.

In the *Baltimore & Ohio* case the Court sustained the doctrine that the wholesaling of passenger transportation could be put at a lower rate than that allowed to the individual, so that the *Baltimore & Ohio* case laid down a rule entirely in conflict with the argument in the *Lake Shore* case.

While the Commission differentiated this ticket from the wholesale principle, as applied to resale of goods, and from the principle as applied to hauling in car-load lots, it certainly cannot be distinguished from the case above cited, for in that case tickets sold to ten persons, although the total amount paid did not reach \$72, were recognized as having applicable to them the wholesale principle.

Nor did the Commission distinguish the sale of this ticket from the wholesale principle as applied to companies furnishing gas, electricity or telephones, and the right of these companies is recognized to charge varying rates according to the amount of service to be rendered, even though that service is furnished customers, not all at once, but from time to time.

In the *Towers* case, the Court said:

“In *Interstate Commerce Commission vs. Baltimore & Ohio R. Co.*, 145 U. S., 263, 35 L. E. 699, this court held that a ‘party rate ticket’ for the transportation of ten or more persons at a less rate than that charged a single individual did not make a discrimination against an individual

charged more for the same service, or amount to an unjust or unreasonable discrimination within the meaning of the Act to Regulate Commerce. In the course of the opinion the right to issue tickets at reduced rates, good for limited periods, upon the principle of commutation, was fully recognized.

"Having the conceded authority to regulate intrastate rates, we perceive no reason why such power may not be exercised through duly authorized commissions, and rates fixed with reference to the particular character of the service to be rendered.

"*In Norfolk & W. R. Co. vs. Conley*, 236 U. S., 605, 608, 59 L. E., 745, 747, after making reference to *Northern P. R. Co. vs. North Dakota*, 236 U. S., 585, 59 L. E. 735, this court said:

"It was recognized (in the *North Dakota Case*) that the state has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services."

"That the state may fix maximum rates governing one-way passenger travel is conceded. Having the general authority to fix rates of a reasonable nature, we can see no good reason for denying to the state the power to exercise this authority in such manner as to fix rates for special services different from those charged for the general service. In our opinion the rate for a single fare for passengers generally may be varied so as to fit the particular and different service which it involves, as do commutation rates, the disposition of tickets to passengers who have a peculiar relation to the service.

“The reasoning of these decisions is sound and involves no violation of the Federal Constitution. True it is that it may not be possible to reconcile these views with all that is said in the opinion delivered for the majority of the court in the case of *Lake Shore & M. S. R. Co. vs. Smith, supra*. The views therein expressed which are inconsistent with the right of the states to fix reasonable commutation fares when the carrier has itself established fares for such service must be regarded as overruled by the decision in this case.

In the *Minnesota Rate Case (Simpson vs. Sheppard, 230 U. S. 332)* the Court sustained a lower fare fixed for passengers under twelve years of age.

In *Interstate R. Co. vs. Mass., 207 U. S. 79*, a special rate less than the maximum for school children was approved, and the Court quoted with approval the statement in *People vs. Public Service Commission, 159 N. Y. App. Div. 513*, to the effect that:

“These cases indicate that the *Smith* case is not to be extended beyond the facts upon which it rests.”

In *Commonwealth of Massachusetts vs. Interstate Consol. S. R. Co., 187 Mass. 486*, the validity of an act providing that school children should be carried at half fare was upheld.

In *San Antonio Traction Co. vs. Altgelt (Tex. Civ. App), 200 U. S. 304*, the Supreme Court sustained an act requiring half fare tickets to be furnished by street car companies to school children.

In *Purdy vs. Erie Railroad Co., 164 N. Y. 42*, and in *Minor vs. Erie R. Co., 171 N. Y. 566*, a statute was upheld requiring thousand-mile ticket books at reduced rates.

In *Duluth Street Ry. Co. vs. R. R. Commission*, 161 Wis. 262, an order requiring a street railway company to sell six five-cent fares for twenty-five cents was upheld. See also *Norfolk & Western Ry Co. vs. Conley*, 236 U. S. 605; *Knott vs. Chicago, B. & Q. R. Co.*, 230 U. S. 475; 57 L. E. 1572.

The Railroads Cannot Complain of a Grievance Which is Not Their Own

In *Interstate Commerce Commission vs. Chicago, R. I. & P. Co., et al.*, 218 U. S. 88, 54 L. E. 947, the railroad companies attacked an alleged discrimination against certain trade centers which would be caused by the order of the Commission. The Court held that while the railroads would be heard as to the effect of the order on their revenues, their objections would not be considered on the ground that it discriminated between shippers and trade centers.

The Court ruled:

"We have said several times that we will not listen to a party who complains of a grievance which is not his own. *Clark vs. Kansas City*, 176 U. S., 114, 118; 44 L. E., 392; *Smiley vs. Kansas*, 196 U. S., 447, 49 L. E., 546."

In the case of *Louisville & N. R. Co. vs. Finn*, 235 U. S., 601; 59 L. E. 379, 384, the Court said:

"It is incumbent upon one who seeks an adjudication that a state statute is repugnant to the Federal Constitution to show that he is within the class with respect to whom it is unconstitutional, and that the alleged unconstitutional feature injures him, and so operates as to deprive him of rights protected by the Constitution."

So that, in any event, the railroad companies have no cause to complain because some individuals may not have a sufficient amount of money to purchase this scrip coupon book, and may therefore be required to pay a rate per mile for their transportation different from that paid by the purchaser of the scrip coupon book. Nor can they complain of the scrip coupon book at the lower rate unless the rate is confiscatory, and we have clearly shown that it was not confiscatory.

THE ORDER REQUIRED THE SCRIP COUPON BOOKS TO BE ISSUED FOR TWELVE MONTHS. THE COURTS HAVE FREQUENTLY APPROVED EXPERIMENTAL ORDERS BY COMMISSIONS, AND SOMETIMES REQUIRED THEM.

The Court has been asked to intervene and enjoin an order of the Commission before any actual experience has shown the practical result of the rate thereby established. The evidence before the Commission as shown herein fully justified the conclusion reached by the Commission that the rates fixed were just and reasonable. Except in "clear cases" of confiscation, until it has been shown by experimentation that a rate is confiscatory or noncompensatory, the Supreme Court has held that the Courts will not interfere.

In *Knoxville vs. Knoxville Water Co.*, 212 U. S. 1, 53 L. E. 371, Mr. Justice Moody said:

"The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. * * * If hereafter it shall appear, under actual operation of this ordi-

ance (an ordinance fixing maximum water rates for the city of Knoxville), that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent another application to the court, * * * but as the case now stands there is no such certainty that the rates prescribed will necessarily have the effect of denying to the company such a return as would avoid confiscation."

In the case of *Wilcox vs. Consolidated Gas Co.*, 212 U. S. 19, 53 L. E. 382, Mr. Justice Peckham uses the following language:

"Increased consumption at the lower rate might result in increased earnings, as the cost of furnishing the gas would not increase in proportion to the increased amount of gas furnished.

"Of course there is always a point below which a rate could not be reduced and at the same time permit the proper return on the value of the property but it is equally true that a reduction in rates will not always reduce the net earnings, but on the contrary may increase them. *The question of how much increased consumption under a less rate will increase the earnings of a complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test.*

"Where the rate complained of shows in any event a very narrow line of division between possible confiscation and proper regulation, * * * a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate, and thus eliminating, as far as is possible, the doubt arising from opinions as opposed to facts."

The adoption of a practical test of rates has also been sustained by the Courts in *Tilley vs. Railroad Co.*,

5 Fed. 641, 662, and in *Pennsylvania R. Co. vs. Towers*, 94 Atl. 337 (Md.).

In the first of these cases, the Court said:

“Which view is the correct one it is impossible to decide. * * * There is, however, a conclusive way, and one only, in which this controversy can be settled, and that is by experiment. A reduction in railroad charges is not always followed by a reduction of either gross or net revenue. It can soon be settled which is right—the Railroad Company’s officers or the Railroad Commission—in their view of the effect of the Commission’s tariff of rates, by allowing the tariff to go into operation.”

In the case of *Pennsylvania vs. Towers*, above cited, the Court said:

“It may turn out as the result of the revision of these tariffs that there will be more monthly tickets sold and fewer of the 100-trip tickets, but all of this is to a very considerable degree a matter of conjecture merely. The true test of the effect upon the revenue of the changes made must, and can only, be the test of time and practical experience.”

See also *C. B. & Q. R. Co. vs. Dey*, 38, Fed. 556, and *I. C. C. vs. Illinois Cent. R. Co.*, 215 U. S. 451, 54 L. E. 281.

See also *New England Divisions case*, *infra*, p. 47.

It is true that counsel for the railroad companies insist that no real information can be obtained from the experiment, but the Commission believed that information could be obtained that would be vital. They require certain reports to be kept. They permitted

any one of the railroads affected to apply later on to the Commission and submit evidence upon the subject. The number of these scrip coupon books sold and used, the balance of the passenger travel, how the total revenues of the railroads are affected, all these will be evidence furnishing information as to the ultimate effect of this ticket on the railroads. Undoubtedly the tickets will stimulate business and thereby secure to the railroads an increase in freight. The experimental nature of the order is an additional reason for holding it just and reasonable.

THE NEW ENGLAND DIVISIONS CASE

The case of *Akron, Canton & Youngstown Railway Co. vs. U. S.*, 67 L. E. 308, 315, decided in February, 1923, is known as the New England Divisions Case. This case grew out of the fact that the Interstate Commerce Commission had provided, by an order entered in *Ex parte 74*, a division of freight rates between the New England carriers and carriers operating West of the Hudson River. Subsequently a second order of the commission increased the proportion of these rates to the New England roads 15 per cent. The roads west of the Hudson River sought to enjoin this order.

The opinion of Mr. Justice Brandeis, delivered in this case, applies to a number of points raised by appellees in the present case.

The Court said:

"The order entered in *Ex parte 74* was at all times subject to change. The special needs of the New England lines were at all times before the Commission. That these needs were met by two orders instead of one, is not of legal significance.

"To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. * * *

"Whether a hearing was full, must be determined by the character of the hearing, not by that of the order entered thereon. A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. The Commission recognized, and observed, these essentials of a full hearing. * * *

*"That the evidence left in the minds of the Commission many doubts, is true. But it had brought conviction that the New England lines were entitled to relief. * * **

*"A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. * * * That the order is not obnoxious to the due process clause, because provisional, is clear. If this were not so, most temporary injunctions would violate the Constitution. * * **"
(Italics ours.)

THE ACT AND THE ORDER DO NOT APPLY TO INTRASTATE PASSENGER TRAVEL

Neither the act nor the order under consideration apply to transportation of passengers wholly intrastate. The amendment was part of the Interstate Commerce Act, and the general provisions of the Act with reference to limitation of the authority of the Commission were applicable to this amendment.

In *Texas vs. Eastern R. Co.*, 258 U. S. 204; 66 L. E. 566, this Court held:

“Provisions of the Transportation Act of February 28, 1920, which are amendments of the Interstate Commerce Act, and are so styled, are to be read in connection with the Interstate Commerce Act and its other amendments.”

The Court was considering new paragraphs which had been added to the Interstate Commerce Act. These additional paragraphs did not specifically state that they related alone to interstate commerce, and the question arose as to their proper construction.

The Court said:

“If paragraphs 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. Of such a situation this court has said: ‘Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.’” (Id. 217.)

The rule of construction which will find a constitutional meaning for a statute, if it can be done, is so thoroughly established, and so universally recognized, authorities upon this subject need not be quoted.

We call attention to the foregoing authority as it applied specifically to the Interstate Commerce Act, and it covers the question raised by counsel with ref-

erence to the meaning of the amendment to the Interstate Commerce Act now under consideration. The same rule would equally apply to the order of the Commission. Neither the Act nor the order of the Commission should be construed to apply to travel exclusively intrastate.

THERE IS NO UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER TO THE COMMISSION IN THE PROVISIONS OF THIS STATUTE.

In the nature of the case, the standards set up to guide the Commission in its action can be general only. The Commission was to exempt certain carriers where the particular circumstances justified such exemption. Congress could not possibly specify the detailed circumstances under which the Commission might or might not exempt certain carriers from the operation of its order; that determination was wisely and lawfully left to the Commission. The provision made by Congress in this connection is the only practicable one under the circumstances.

In *Attorney General vs. Old Colony Railroad*, 160 Mass 62, the Act of the Legislature left to the Board of Railroad Commissioners of Massachusetts the determination of what companies should be exempt from a regulation directing the sale of mileage tickets. The Court held that the law was not unconstitutional on the ground that it delegated legislative power to the Board of Railroad Commissioners.

In *Interstate Commerce Commission vs. Goodrich Transit Co.*, 224 U. S. 192, 56 L. E. 729, 737, the Court said:

"Furthermore, it is said that such construction of paragraph 20 (of the Interstate Commerce Act) makes it an unlawful delegation of legislative power to the Commission. We cannot agree to this contention. The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress. This rule has been frequently stated and illustrated in recent cases in this court, and needs no amplification here. *Buttfield vs. Stranahan*, 192 U. S., 470, 48, L. E., 525; *Union Bridge Co. vs. U. S.*, 204 U. S., 364, 51 L. E., 523; *U. S. vs. Grimaud*, 220 U. S., 506, 55 L. E., 563."

In *Louisville & Nashville Railroad Co. vs. Garrett*, 231 U. S. 298, 58 L. E. 229, and in *Kansas City S. R. Co. vs. U. S.* 231 U. S. 423, 58 L. E. 296, the Court upheld statutes making general provision for the regulation of railroad accounting by Railroad Commissions, where it was contended that such statutes unconstitutionally delegated legislative authority.

In *Lehigh Valley R. Co. vs. U. S.*, 234 Fed. 682, the District Court of Pennsylvania held that the delegation to the Commission of authority to make orders permitting the common control of two competing carriers, where warranted by the circumstances, as shown to the Commission, was not unconstitutional.

The Provision in the Order of the Commission Exempting Certain Roads From Its Operation Was Just and Reasonable.

The Commission exempted all the roads of Class II, Class III and switching and terminal companies. It also exempted some portions of other lines, leaving 176 carriers, all Class I, to which the order was applicable. The authorities before cited show that appellees cannot complain of an order which did not injure them. They complain that they were required to issue a scrip coupon book at a reduced rate. The fact that other roads were not required to issue the scrip coupon book at a reduced rate does not in any way injure the 176 carriers subjected to the order, but the reason of the Commission for exempting the 997 carriers from issuing this scrip coupon book is just and reasonable. They were short lines, electric lines, switching and terminal carriers whose business was almost entirely intrastate. Many of them had no passenger traffic and did not sell passenger tickets to points on other lines. They were carriers entirely differing in class from the 176 to which the order was made applicable.

Upon this subject the Commission found:

“The principal reasons assigned for exception by the short lines, the electric, and the switching and terminal carriers are that they are engaged chiefly in intrastate commerce, that their passenger traffic is negligible, that they do not honor or sell passenger tickets to and from points on other lines, that they have no passenger train service, and that there will be little or no demand of them for interchangeable scrip or mileage tickets. We are of the opinion that the particular circumstances shown to us warrant the exemption of all

carriers by rail which are not included in Appendix C."

Appellees have complained of the order excluding all but 176 roads, and again they, in effect, complain because they were not all included. If anything were necessary to relieve doubt about the protection of the railroads from loss on account of requiring them to do business on the credit of other railroads, the fact that only the Class I roads are included in this order is sufficient.

In *Wilson vs. New*, 243 U. S. 332, the Court held that the Adamson law which exempted short lines and electric railroads did not violate the constitutional requirement of equal protection of the laws.

Chief Justice White, delivering the opinion of the Court, said:

"The want of equality is based upon two considerations. The one is the exemption of certain short lines and electric railroads. We dismiss it because it has been adversely disposed of by many previous decisions." (Id., 354.)

Dow vs. Beidelman, 125 U. S., 680, 31 L. Ed. 841; 5 Sup. Ct. Rep., 1028; *Chicago R. I. & P. R. Co., vs. Arkansas*, 210, U. S., 458, 55 L. Ed., 290, 31 Sup. Ct. Rep., 275, and other cases.

Appellees insist that the classification of the roads, according to their earning capacity, was illegal and cite *Cotting vs. Kansas City Stock Yards Co.*, 183 U. S. 79.

This decision was a stock yard case.

With reference to it in *Arkadelphia Milling Co. vs. St. Louis S. W. R. R. Co.*, 249 U. S. 134, the Court held

while the opinion of Mr. Justice Brewer covers a wide range of discussion, a majority of the Court placed the decision upon the ground that the statute of Kansas applied only to a single company, and not to others engaged in *like business* in the state, and thereby denied to that company the equal protection of the laws.

THE REQUIREMENT OF THE ACT THAT ONE CARRIER SHOULD TRANSPORT PASSENGERS UPON THE CREDIT OF EVERY OTHER CARRIER DOES NOT VIOLATE THE FIFTH AMENDMENT, TAKING THE CARRIERS' PROPERTY WITHOUT DUE PROCESS OF LAW.

The criticism by appellees, of the Act and order of the Commission thereunder, claiming lack of due process of law, can hardly be taken seriously.

In *12 C. J. 1195*, it is stated:

"So numerous, so varied, and in many cases so trifling have been the questions raised as to the protection afforded by the guarantee of due process of law that objections founded on it have been judicially characterized as 'those last resorts of desperate cases,' " citing *Commonwealth vs. Philadelphia*, 145 Pa., 283, and *Davidson vs. New Orleans*, 96 U. S., 97, 24 L. E., 616.

In the latter case, the Court, speaking through Mr. Justice Miller, said:

"In fact it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this Court the abstract opinions of every unsuccessful litigant in a State Court

of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

In the case of *Pennsylvania Co. vs. U. S.*, 236 U. S. 351, 59 L. E. 617, the Court upheld the proposition that the property of one carrier is not appropriated without compensation to the use of another carrier, contrary to the 5th Amendment to the Constitution, by an order of the Interstate Commerce Commission requiring the interchange of carload freight, citing and quoting at length from the case of *Grand Trunk R. Co. vs. Michigan R. Commission*, 231 U. S. 457, 58 L. E. 310.

In the latter case, the Court, after differentiating the case of *Louisville & Nashville R. Co. vs. Central Stock Yards Co.*, 212 U. S. 132, cited by the appellee, in the lower court, said:

"In the case at bar a shipper is contesting for the right (i. e., to interchange cars and traffic) as a part of transportation. The order of the Commission was a recognition of the right, and legally so."

In the case of *Michigan Central R. Co. vs. Michigan R. Commission*, 236 U. S. 614, 59 L. E. 751, also cited by appellee, the Court held that the property of a carrier is *not* taken without due process of law, contrary to the 14th Amendment by an order of the Michigan Railroad Commission, requiring such carrier to interchange carload and less than carload shipments and passenger traffic.

In the present case, the Commission sent out notices to the carriers of a hearing. They were given all the time they desired, presented evidence, and were allowed, at the hearing, to be represented by counsel, and

to support their contentions by written arguments. In the proceedings before the Commission the fullest consideration was given to the matter presented by the carriers, and the order was passed only after the most complete investigation of their views.

In the case of *Louisville & N. R. Co. vs. Finn*, 235 U. S. 601 L. E. 379, 384, with reference to Kentucky statutes No. 820a, authorizing the State Railroad Commission to determine whether a railroad company had been guilty of extortion, and if it had, then to establish a just and reasonable rate for services thereafter to be rendered, and No. 829, authorizing the Commission to hear and determine complaints thereunder and to render such awards as it might deem proper, the Court said:

“We have already seen that there was evidence to support the Commission’s affirmative finding upon the latter point. And this leaves no basis, as we think, for appellant’s present attack upon No. 829 as repugnant to the due process provision of the 14th Amendment. In the proceedings before the Commission, there were pleadings sufficiently formal, and appellant was permitted to raise such issues and introduce such evidence as it desired.” (See also *Buttfield vs. Stranahan*, 192 U. S., 470; 48 L. E., 525.)

Appellees in the Court below cited *Attorney General vs. Old Colony R. Co.*, 160 Mass., 62, in support of the proposition that the Act violates the 5th Amendment, taking the carriers’ property without due process of law, since it requires one carrier to transport passengers upon the credit of every other carrier.

This decision was rendered in 1893, and while the majority of the Court did hold the Act invalid be-

cause it "compelled one railroad to carry passengers on the credit of another," and stated, "We have been referred to no judicial decision where any such legislation has been considered," Mr. Justice Knowlton dissented, and Mr. Justice Holmes, now of the Supreme Court, concurred in this dissent and said:

"It is a matter of common knowledge that every railroad does business on the credit of other railroads, to a much larger amount than would ever be done under a statute of this kind. But, suppose there is a possibility of trifling loss in a case which might arise under the statute, that does not render the statute unconstitutional."

The dissenting opinion of Mr. Justice Knowlton, concurred in by Mr. Justice Holmes, is a correct presentation of the law as the Courts now interpret it.

It is furthermore true that a fund collected by a railroad from the sale of a ticket from other roads should properly be regarded as a trust fund in the possession of the original seller, and any Court of Equity should so recognize it, and hold the fund for the beneficiaries to whom it was due, certainly to the extent that any of the coupons might have been used on another road. "Such balances have been regarded as debts of a preferred character when there was a receivership." *Atlantic Coast Line case, infra.*

This question has been further considered by the Court in *St. Louis S. W. R. Co. vs. U. S.*, 245 U. S., 136, 62 L. E., 199, 207. In this case the Court said:

"But it is contended that if a carrier establishes a through route and joint rate with its connections, it creates in effect a relation of partnership; that this relation must be entered into, if at all, voluntarily; and that to 'Compel a carrier

chartered by a state' to enter into such a relation with a carrier chartered in another state violates the 5th Amendment of the Constitution. The complaining carriers having engaged in this particular commerce, it is clear that Congress has power to regulate it." Citing *Atlantic Coast Line Case*, 219 U. S., 186, 55 L. E., 167.

This question is too well settled to require lengthy exposition. The lower court, in its opinion, correctly summarized the law in this respect, citing the *Atlantic Coast Line Case*, *Michigan R. Co. vs. Michigan R. Com.*, and *St. Louis S. W. Ry. Co. vs. U. S.*, all of which are discussed above.

CONCLUSION.

1. The Act and the history of its passage show that the mileage ticket or scrip coupon book provided for by the Act was expected to be a ticket sold at a rate less than 3.6 cents per mile.

2. The Commission found from the evidence that the scrip coupon books should be sold at less than 3.6 cents per mile, and that a reduction of 20 per cent was just and reasonable. The Commission did not abdicate the functions vested in it.

3. There having been before the Commission evidence that the passenger cars of the railroad companies were being moved only partially filled and that the reduced rate would greatly increase travel without any substantial additional cost to the railroad companies, there was evidence to sustain the conclusion that a 20 per cent reduction would be just and reasonable, and the courts will not interfere with the discretion of the Commission.

4. There was no lack of due process, for the railroad

companies were cited before the Commission and given by the Commission the amplest opportunity to present their case, both by witnesses and by counsel.

5. The rate fixed was not confiscatory :

(a) The receipts by the railroad companies for passenger transportation during the first six months of 1922 were \$500,000,000. The revenue passenger miles of railroad companies for the same period was 16,467,000,000. This made the average receipt per passenger per mile 3.03 cents. The operating expenses were 85.24 per cent, which made the average cost to the railroad companies 2.58 cents per passenger mile. The order of the Commission provided that the scrip coupon books should be sold at 2.88 cents per mile, substantially more than the cost per mile for transportation in 1922;

(b) The revenue passenger miles of the railroad companies in 1920 were 46,849,000,000, but for the first six months of 1922 were only 16,487,000,000. In 1919 the average passengers per car was 21. During the first six months of 1922 the average passengers per car was 15. The proof showed that the scrip coupon books would greatly increase travel by filling up the cars without adding any substantial expense to the railroad companies;

(c) Without resorting to the doctrine of recapture, which would be just and reasonable in view of the enormous increases made in the last few years in charges for passenger service, the evidence supported the conclusion that the increase of travel would prevent any loss of net revenue by the railroad companies.

(d) The order of the Commission required a trial of this reduced rate for eight months, after which time results could be brought by the railroad companies to the attention of the Commission for further consideration.

6. The order did not create an arbitrary and unreasonable discrimination in fares between passengers but, if it had done so, this was not an objection which the railroad companies could successfully urge, as the railroad companies can not complain of a grievance which is not their own.

7. The authority of the *Lake Shore* case has been confined by this court to the facts in that case. They differ greatly from those in the present case. The reasoning of Justice Peckham in that case has not been accepted by this court as sound.

HOKE SMITH,
SAMUEL BLUMBERG,
Attorneys for Appellants.

APPENDIX

The Evidence Before the Commission.

Mr. Fox, a witness for the railroads, said, in the hearings before the Commission:

"Prior to the 2c fare laws, however, mileage tickets were sold very extensively throughout Central Passenger and Western Passenger Association territories, and their utilization was constantly increasing from year to year." (P. 157.)

One cannot say from the evidence that certain carriers may not always have held, or numbers of carriers may not sometimes have held, the belief that mileage was contrary to their interests, but what the motives behind this attitude were does not appear, and as far as appears from the persistence of this practice despite variations in its application, it would seem that the carriers continued it not because they could not cooperate for its removal, but because they believed or hoped, as the witness said (p. 116) it would increase their revenue.

It appeared (p. 157) that up to Federal control mileage discounts continued as follows:

In New England 10%, in Central and Passenger Trunk Lines Passenger Associations 10%, in Southeastern territory 20%, although permission had been then obtained from the Interstate Commerce Commission to reduce the percentage and actual reduction was awaiting authority of State commissions, in Southwestern territory 16 2-3%; in a major portion of the Western territory 16 2-3%. There were some reductions which ranged greater and in times past were in excess of 10%; in some regions running as high as 33 1-3%. (P. 157.)

The only witnesses for carriers themselves admitted (p. 107):

"The evidence of this character necessarily is largely *fragmentary*."

"I don't know from statistics whether there was more travel as a result of these reduced rates, so that of course, I would not be prepared to say now if there were a reduced rate that traffic might be stimulated." (P. 116.)

Again they showed the value in their own eyes of the evidence presented by the carriers to the Commission as follows:

"Data is not available that would directly show either increase or decrease in the passenger revenue created by the use of these mileage books." (P. 118.)

"I have no direct information or figures to show whether or not loss of revenue resulted from the issuance of mileage books at reduced rates. It would be practically impossible to compile data of that character. I would not know how to go about it." (P. 121.)

"I have no data to show whether or not the issuance of interchangeable mileage books in the past was profitable to the carriers. We have no facts or figures to show whether loss of revenue would result now from the issuance and use of interchangeable scrip books at reduced rates." (P. 124.)

"At this moment I am unable to make any suggestion that would make it possible for the Commission to draw an inference either way as to the effect the use of mileage books has had upon the revenue of the carriers using them. I do not at present know of any data." (P. 124.)

"With reference to the time when mileage books

were sold at reduced rates I can tell you how much of the total passenger revenue was derived from their use, but I cannot tell whether or not their issuance and use increased or decreased the total passenger revenue." (P. 125.)

Moreover, the amount of direct loss in revenue, without regarding stimulation of traffic, which will accrue to the carriers of the country and to the Eastern carriers particularly was not stated with such positiveness in the testimony as in the petition of the carriers in this action.

In the first place it was based for the country upon an estimate that the total average revenue derivable from ordinary one way tickets sold at full normal fares was about one billion dollars annually, the witness said as to this, however, (p. 156):

"It is a guess, except that we know rather accurately what the surcharge and the commutation are."

It was next estimated (p. 158) that 30% of this travel at full fares would be made on an interchangeable scrip coupon ticket good for \$90 transportation to be sold at \$72. However, it was said as to this:

"This is the best judgment of the carriers, but it is *purely* speculative."

Even this *pure* speculation should to some extent have been based upon past experience in the use of mileage books. (P. 156.) *It was not shown in stating such figures for the past how much they represented of travel, which would have moved at the full fare, and*

how much of newly created traffic. These carriers produced no evidence to the commission of any weight showing even the direct reduction of revenue, without considering the stimulation of traffic brought about.

Regarding excursion, convention, commutation and tourist fares, although the witness could see no increase as a result of mileage or coupon books, it was admitted that the former were justified in whole or in part by the *stimulation of traffic brought about*; the witness said:

“A ticket sold at a tourist fare is what the passenger representatives would term a created business. It is new business that they would not otherwise derive. It adds to the passenger revenues, rather than detracts from them and there is a great difference as between mileage, reduced rate mileage ticket, and the ticket sold at a reduction to the tourist.” (P. 109.)

With this certainty as to the increase of revenue by tourist fares, it was strange that the witness could not show experience as to whether mileage tickets had or had not in the past increased travel and revenue.

Again the witness said:

“The ten-ride commutation ticket and the family commutation ticket all add to the daily average travel which produces that return on the carload service which we have previously alluded to. It is not as frequent as the daily passenger, but a twenty-five-ride ticket does produce averages which enable the entire commutation business to make a satisfactory net return.” (P. 110.)

And further:

“Through tickets from New York to the coast, for example, at a reduced rate, are issued in order *to encourage business*; that is, *to encourage any-*

body who wants to use them, the traveling public generally. When I use the word 'business' I do not mean the merchant or the commercial traveler only; I mean the traveling public generally. The through ticket from Chicago to the coast and return, at a reduced rate, is issued *to encourage traffic*, not traveling salesmen only but of the general public." (P. 116.)

"During the past year the carriers have voluntarily issued a considerable number of excursion tickets at reduced fares, some of which were one-third reduction from the standard fares. There was a great range in the reduction. Some were 10%. This was done to stimulate travel." (Pp. 158, 159.)

No analogy was apparent to the witness between dead space and dead weight carried by the railroads without compensation for lack of business and dead goods of which the merchant had to dispose. Yet at the time the railroads were hauling passenger cars carrying an average of but 15 passengers per car.

"The merchants were trying to stimulate business. They were very largely stocked; they had to get rid of dead goods. The railroads have no dead goods; they are selling only one commodity which they cannot afford to sell at a loss." (P. 123.)

The witness said in speaking of the number of mileage clerks required in 1915, 1916 and 1917 by the Southern Railway: (p. 159)

"There is no substantial increase of mileage clerks even though there is a substantial increase of passenger business."

As to the danger from scalping and other abuses, the witness said: (p. 122)

“If all of these provisions (identification by photograph, etc.) were adopted I would consider a photographic form of ticket interchangeable for coupons at stations before the passenger boards the train reasonably protective.”

The carriers have urged that if there were any profit to be derived from the sale of scrip coupon tickets they would be the first to desire its adoption. Even if the carriers had come to such conclusion without being influenced by consideration of other factors than the result of the scrip ticket on net revenue, the commission, of course, would not be compelled to accept their self-presumed judgment. However, when it is considered that this judgment of the carriers may be swayed by ulterior motives having nothing to do with the effect on net revenue, the failure of this contention is readily apparent. As an example of what is meant the witness said: (p. 108)

“Wherever a reduced mileage rate prevailed, the traveling public to a considerable extent could not be convinced that the same basis should not prevail for all regular passenger travel. The pressure was always for a downward revision.”

Of course, no such reason affects the reasonableness of the scrip rate, but it emphasizes that the carriers so-called judgment as to the value of the scrip coupon ticket at a reduced rate in maintaining or increasing net revenue should not have had before the Commission and has not before this court the weight which they would claim for it.

The record discloses that men for many years interested in passenger and freight traffic over the railroads of this country and all long experienced with problems of transportation, representing the International Federation of Commercial Travelers, the American Hotel Association, The Merchants Association of New York, testified that the reduced rate scrip book would greatly benefit the public and the carriers alike. (pp. 126-131, 151-155.)

These men testified that, in their opinion, the rates now in force were so high that they discouraged and seriously curtailed travel by the very persons, who if proper reduction were fixed, would not only themselves do such an additional amount of traveling as would more than compensate the carriers for the direct loss from such a reduction, but a great majority of whom would also by the additional amount of effort they would be enabled to put forth as a result of such a reduction, so stimulate the commerce of the country and its business generally that the freight traffic also of the carriers would be increased.

In support of these statements the witnesses testified that the reduction would be an inducement to traveling salesmen on commission now reluctant to venture into new territories and business houses now finding it impracticable because of the expense entailed to open up new territory, to do so, that in the same manner and for the same reasons many more salesmen would travel, and that all salesmen generally as well as other people would make longer trips.

Mr. John F. Shea, a member of the executive council of the American Hotel Association and chairman of its travel bureau committee, stated: (p. 128)

"I am of the firm opinion, as are also my associates, that any reduction in passenger rates either by the use of interchangeable scrip book or tickets of any kind, immediately develops business, and there is constant and immediate reaction felt in the hotels of the United States. Hotels of the United States are particularly situated in that manner, that the slightest imposition put on travel or the loosening up of travel, immediately is felt by them."

Aaron M. Loeb, President of the National Council of Traveling Salesmen's Associations, member of the executive committee of the New York Men's and Boys' Apparel Industries, Inc., and sales manager of a large manufacturing concern, said: (p. 131)

"I will illustrate how the mileage traveled may be increased even without enlarging the general territory covered. We have practically today eliminated all towns under 5,000, because it does not pay us with the present excessive cost of travel to have our men make those smaller towns. Formerly we made everything of 2,500 and upward; in some instances as low as 1,500. Now those merchants in the smaller towns are deprived of the facility of making personal selection from samples shown them by traveling salesmen, which is a decided advantage for the smaller dealer in the small town, who otherwise is compelled to order from catalogue or by the open-order method, whereby he may get what he wants and he may not."

James C. Lincoln, traffic manager of the Merchants' Association of New York, testified to the above effect for that association (p. 153), for the Chicago Association of Commerce (p. 154), and the National Wholesale Grocers' Association (p. 154).

In the record (pp. 131 and 151) will be found the expression of many merchants throughout the United States who state that if a mileage book is issued at a reduced rate it will greatly stimulate business and travel. The investigation conducted by the commercial travelers includes firms, both small and large, covering all sections of the country, and in varied lines of business. (A partial list of the commodities in which some of these firms deal, given below, was submitted to the Commission.)*

The unanimous and confident estimate of merchants is shown that reduced rates will stimulate passenger and freight carriage far beyond any temporary loss in revenue directly entailed by the reduction. *They give specific information as to the number of men taken off the road, decrease of traveling in weeks, the*

* Men's Clothing

Yarns and Art Needlework
Wall Paper
Tobacco
Corsets
Hats and Caps
Brushes
Silk
Pianos
Shoes
Music Publications
Laces and Embroideries
Gloves
Tools and Saws
Paints
Paper
Cement
Veilings
Hosiery
Underwear
Books and Periodicals
Cotton Goods
Sponges and Chamois
Inks
Bags
Ladies' Dresses
Waists

Petticoats
Textiles
Metals
Neckwear
Ribbons
Phonographs
Shade Rollers
Automobile and Rain Coats
Linens
Fruit Products
Gum and Mica
Twines and Cordage
Pens
Sweaters
Fancy Goods
Uniforms
Bicycle and Auto Supplies
Woolens
Notions
Lace Curtains
Toys
Confectionery
Shirts
Carpets
China
Jewelry
Stationery

limitation of, the retarding of business, all of which they attribute mainly to the high rates of transportation; they state definitely that with a reduced rate of from 25% to 33 1-3%, merchants would increase the number of men on the road, extend territory covered as well as the time of trips; that such reduced rates would enable them to reenter and open to trade, country districts and smaller towns. They show how the higher cost of transportation has driven merchants whose selling departments need a large amount of transportation to comparatively inefficient expedients, resulting in large losses to the carriers, such as the use of the automobile, mail, photograph, telephone and telegraph. A few of these statements, indicative of the trend of this evidence, follow:

J. H. & C. K. Eagle, Inc., 265 Fourth Avenue, New York City, silk manufacturers: Mr. W. S. Fraser, Sales Manager, states: "We are very keenly interested in the securing of a general mileage book which would materially reduce the amount of money we are compelled to expend in traveling our force of approximately twenty salesmen. Naturally in times like the present when all institutions are endeavoring to hold their overhead down, the lowering of railroad charges would have a tendency to have our salesmen cover their territories more extensively and more frequently than they are now doing. Another fact to be considered is that we would also feel more inclined to increase our selling staff of traveling salesmen if the selling cost could be reduced from the high point that it has now reached. Railroad fares and hotel charges have both been excessive and anything that will tend in the direction of reducing them will undoubtedly have the effect as indicated above. We trust you may be successful in securing this much needed mileage book."

Straube Piano Co., Hammond, Ind., manufacturers of pianos: Mr. R. S. Dunn, Central and Northwestern representative, advises that their salesmen operate on commission without drawing account. With the present railroad rates the men will not attempt prospects where an order is not assured. "This leaves dealers all over the territory who could possibly be sold without a personal contact with our road men. When urged to make these calls, the salesmen simply tell us that they cannot afford to spend the money without assurance of an order. Regular established trade is visited but the missionary work without which no factory can exist is not done. Under lower rates, these men would feel justified in extending operations into new territory, and would double the present amount of traveling which has reduced itself to about fifteen weeks a year."

Bolway & Co., Syracuse, N. Y., phonographs: Mr. Frank E. Bolway, President, states that they traveled 20 representatives continuously during the year round for many years, but that during the past two years they have diminished their traveling to one-half the year. The cause for diminishing travel being high cost, adding that "present rates are destructive."

M. H. Birge Sons Co., Buffalo, N. Y., wall paper manufacturers, through Mr. Howard M. Eston, Vice-President, advise that their sales force has been greatly diminished and that they have reduced the number of weeks of travel from 37 weeks per annum to 17 weeks, excessive rates being responsible. Under more favorable rates they would feel inclined to make a more thorough canvass for business.

The Whitaker Paper Co., Baltimore, Md., Mr. J. Evan Resse, Managing Director, reports that they traveled 23 salesmen. The expense of traveling is so

heavy that it curtails their efforts and also forces their men to travel less than they would otherwise do. If the proposed legislation passes, it will doubtless stimulate the action of traveling men and it would have a wholesome effect on business generally. There is no question in the world but that the amount of traveling done by salesmen since the present high cost of transportation has been in force has been materially reduced. If this cost is reduced, the territory will be flooded with traveling men, and where the traveling man goes, there is business. They create business.

Edison Portland Cement Co., 8 West 40th St., W. D. Cloos, Vice-President and General Manager, announces that they travel 27 representatives and further states "practically all of our sales force now cover their territories in automobiles. If the railroad rates would be reduced 33 1-3% it is possible that our salesmen could cover their territories with the same efficiency, at greatly reduced cost per unit."

Fred'k Viotor & Achelis, 65 Leonard St., N. Y. City, cotton goods and yarns: Mr. T. Holt Haywood states that the present rates have been a great hardship for all firms traveling a number of men. We are traveling in this department from 13 to 15 men who cover the country from coast to coast and visit every city of consequence in every state, and on account of the rates which have recently prevailed, our men of course have not traveled as extensively as they might otherwise have done. There is no doubt that if the mileage books could be issued, it would be a very material incentive to travel our salesmen very much more than we have done in the past.

C. G. Crowley, 339 Broadway, New York City: They are now traveling 15 representatives, selling machine needles, cutlery, and that they would "double the num-

ber of men if railroad fares were reduced to a reasonable rate, such as is proposed in connection with the interchangeable mileage book."

S. S. Stafford, Inc., 603 Washington St., N. Y. City, manufacturers of ink: H. A. Barrett, Sales Manager, states: "We are deeply in sympathy with your move. We employ approximately 25 to 30 salesmen a year, who make from 2 to 4 trips over each territory. We have been reluctant to place additional men on the road on account of the excessive traveling expenses since 1917. Our average transportation fares at the present time, not taking into consideration special trips which are frequently necessary, are about \$12,000 per year. Notwithstanding this fact, if the interchangeable mileage book is issued at 33 1-3% reduction, we would add to our selling forces."

Atterbury Brothers, Inc., 145 Nassau Street, New York City: Mr. H. E. Atterbury, President of this company, states that the expense account of our firm relative to mileage for their salesmen has decreased and in place thereof they have been increasing the use of telephone and telegraph. "We estimate a 33 1-3 per cent reduction in railroad fare would result in a 25 per cent increase in the amount of traveling which would be done by our salesmen."

E. T. Eberhardt & Co., 874 Broadway, New York City, advises that traveling by their staff of salesmen was reduced fully 20% during 1920, 1921, on account of the high expense rates. Furthermore, they were compelled to reduce their lines from a trunk line to a suit case line as the expense of carrying a trunk was so high as to make it undesirable. In addition they state: "We believe that a reasonable reduction in general traveling expenses and particularly in railroad fares would increase the amount of our traveling imme-

diately to the mileage covered in 1917, 1918, amounting to an addition of 20 to 25 per cent over the present rates."

Grinnel Brothers, Detroit, Mich.: Mr. S. E. Clark, secretary, states: "It is getting to a point where the expenses are so heavy that few men can make good and unless some change is made so traveling expenses can be reduced, we shall be obliged to abandon that method of trying to do business. We believe railroad fares are too high and the railroad companies will get much less of our money for railroad fares on the present basis than they would get if railroad fares could be reduced considerably. We have covered the entire territory of Michigan for a great many years, but the heavy traveling expense is making it a severe problem as to whether or not we can continue. We could probably supply our salesmen with automobiles and we shall have to do that or something like that unless we get some relief in railroad fares."

The York Card & Paper Co., York, Pa.: Mr. John S. McCoy, General Manager, states: "Our sales force consists of 12 men. Previous to the war it was our custom to send the men out on three trips per year, aggregate between 7 and 8 months of actual traveling. On account of the high cost involved, we told our salesmen to let the customers know that we would only make one trip per year and this procedure resulted in cutting the traveling expense to one-half of what it was formerly or less. If it were possible to secure mileage books at a reduction of 33 1-3%, it would undoubtedly result in our men going back to the old traveling schedule, lasting from 7 to 8 months in each year."

The Tait Paper and Colo Industries, Inc., Glens Falls, N. Y.: Mr. T. S. Marshall, Vice-President and

General Manager, Wall Paper Division, states that they traveled 24 salesmen in 1917 at an average of three trips a year, on an average of 30 weeks each and carry four trunks over each territory. The effect of the high cost of travel has diminished their force to 16 and under a more favorable rate, they would probably increase their sales force without delay.

A. L. Clark & Company, Inc., 311 Sixth Avenue, New York City, staple notions and small wares, state: "The general selling cost, of which railroad fares and baggage were the greatest part, increased to such proportions that in July, 1921, we were compelled to withdraw our men from the road entirely and for the last six months of 1921 they did not travel at all. Furthermore, for the present year, we are preparing lines by photographs, etc., so they will only carry a special hand-case, no trunks whatsoever, in order to average by saving on baggage and transfer and equalize on actual expense. Should an interchangeable mileage book be issued at 33 1-3% reduction, we should not only increase but also return to sample trunks and arrange to increase the weekly travelers' period as well."

Ode & Gerbereux, 421 West Broadway, New York City, confectionery: Mr. Ode states that they traveled 6 representatives who make 7 business trips each year of 6 weeks each and adds that if an interchangeable mileage book at 33 1-3% reduction is issued, they would double the extent of their traveling. This in itself would mean 252 weeks of constant traveling, adding to the income for the railroads.

Stevens & Co., 375 Broadway, New York City, Manufacturers of Bicycle and Automobile Accessories and Tools: Mr. R. E. Pye, Sales Manager, states that they have reduced their sales force from 7 representatives

to 3 and the number of weeks on the road from 40 to 35, net loss, 175 weeks. "Greatly increased expense was a large factor in our determination as to whether or not we would maintain our full force. Would increase the sales force 25 per cent and the weeks traveled proportionately if an interchangeable mileage book were issued at 33 1-3 per cent reduction." Seven men traveled 40 weeks; total, 280 weeks. 1921: 3 men traveled 35 weeks; total, 105 weeks, net loss, 175 weeks.

It seems almost incredible, and must have seemed so to the Commission, that in all the years mileage books have been in use the carriers with all the statistical data available to them, with millions of dollars spent in their different statistical departments had not some pertinent information available.

The evidence set forth and shown above, by those in favor of reduced rate scrip was concrete evidence, such as would and did appeal to the business sense of an expert commission.

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3, 4

STATEMENT OF FACTS.

Amendment of August 18, 1922.

Requires Commission to order interchangeable tickets at "just and reasonable rates" good over all lines.

4, 5

Commission ordered 2500 miles, standard fare \$90, to be sold for \$72—2.88 cents per mile.

5

Amendment passed by Congress at behest of the organized Commercial Travelers.

5, 6

Mileage ticket sold at discount is a discrimination which long escaped prohibition, but was abolished in 1918.

5, 7

Congress has consistently prohibited discriminations in passenger fares, with limited exceptions.

8

The "just and reasonable" standard fare is fixed by the Commission at 3.6 cents.

8

Fixed in 1920 under section 15a of Transportation Act of 1920.

8, 9

Not reduced in 1922.

9

Recent rulings on fares—footnote.

9

3.6 held necessary to produce rate of fair return.

10

Rate of fair return not yet achieved,

11

although, excluding commutation travel, the 3.6 rate has been approximately realized, in spite of tourist and excursion rates.

11

81% of travel, excluding only commutation, and including tourist and excursion, pays 3.481.

11

Enforcement of the order would cause estimated loss of \$32,000,000 a year.

See also p. 62.

12

Operating expense is 85.24%, which, applied to the average fare, excluding commutation, is 2.97.

See also pp. 50, 51.

12

This ticket rate is less than the operating expense (based on average fare, excluding commutation) by .09 of a cent.

12

Fallacy in Commercial Travelers' computations.

13, 14

Additional expense attending this ticket.

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- 13, 15 25% increased travel under this ticket would be required to make up loss in revenue—one billion additional passenger miles.
 See also pp. 70, 71.
- 15 Whether this ticket will stimulate travel the Commission finds pure speculation.
- 15 Wholesale principle does not apply, the Commission finds.
- 16 The order is described by the Commission as an experiment.
- 16 Exemptions by the Commission.

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ARGUMENT.

I.

- 16 THE COMMISSION WRONGLY CONSTRUED THE AMENDMENT EITHER AS REQUIRING REDUCTION OR AS BETRAYING AN UNEXPRESSED INTENTION OF CONGRESS THAT THE RATE BE REDUCED. SO THE DISTRICT COURT HELD.
- 17-19 Quotations from Commission's Report, showing that the majority were trying to adopt what they thought was the "spirit" and "apparent theory" of the Amendment,
- 20 instead of determining the just and reasonable rate upon the evidence and their findings—
- 20, 21 showing also that the conclusion that "the rates resulting from that reduction will be just and reasonable for this class of travel" is contrary to the evidence and the findings of fact,
- 22 and is based upon a guess by the majority that after sufficient experiment it may appear that enough new travel will develop to justify them.
 See also pp. 36-38, Summary of Commission's findings.
- 22 Commission's brief admits that Commission understood that Congress wanted a lower rate.
- 23 The majority wrongly sought instruction from the debates of Congress to depart from the plain meaning.

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- 23 They mistook the real intent of Congress, shown by finally eliminating from the Amendment the provisions for reduction and substituting "just and reasonable rates."
Appendix A (123-138) sets out the 14 bills, all prescribing reductions of 20% to 33 1/3% of the regular fare.
Appendix B (139-157) gives the history of the Amendment (139-140) and quotes extracts from the Debates (140-157).
- 24, 26 Congress knew that the just and reasonable rate was confirmed at 3.6 while the debates were going on.
- 25 "Just and Reasonable Rates" have the same meaning in the Amendment as in the other portions of the Act which prohibit discrimination and require adequacy.
- 26, 27 Congress intended to maintain the rate already established until the Commission should have evidence to change it.
- 27, 28 Congress did not intend such discrimination.
- 29 If it had prescribed reduction, it would not have authorized the Commission to make the ticket transferable.
- 29-34 History of section 22, of which this Act is an Amendment.
See Appendix E, p. 191.
The section is to be read in connection with the rest of the Act, preserving the right of the carriers to grant certain preferences, but not conferring upon the Commission power to require them.
- 30 *Nashville, C. & St. L. Ry. v. Tenn.*, 262 U.S. 318.
See Appendices C (158-175) and D (176-180) for I.C.C. decisions and Conference Rulings referred to in *Tennessee* case.
- 32 Commutation rates already established are a class apart.
- 33 *Penn. R.R. v. Towers*, 245 U.S. 6.

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II.

- 34-61 THE ORDER IS VOID, BECAUSE SUPPORTED BY NO SUBSTANTIAL EVIDENCE, BECAUSE ARBITRARY, AND BEYOND THE COMMISSION'S AUTHORITY.
- 35-40 A. *No evidence upon which to base a finding that the reduction will appreciably increase revenue.*
See Subject Index of Evidence, Appendix F (195, 196).
- 36-38, 40 Commission expressly declined to make such a finding.
- 39 A general reduction would increase travel more, but is not found to be "just and reasonable."
- 41 Optimistic guesses of commercial travelers not treated by the Commission as evidence upon which to base such a finding.
- 42 (They are not even a "scintilla of proof.")
- 42 Decisions holding that an order must be supported by substantial evidence. It must be an "adjudication," not a "fiat."
- 43 B. *The Order confesses itself to be an experiment.*
- 43, 44 An experiment based on existing conditions, plus judgment, may be permissible—not when based solely on conjecture.
- 45 *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, etc., distinguished.
- 46-47 C. *This experiment will not produce evidence as to how many miles will be traveled at 2.88 which would not have been traveled at 3.6 (standard fare) or 3.481 (average fare, excluding commutation).*
- 47-49 D. *This experiment would impose \$1,680,000 per year in extra clerical expense—an additional indication of the unreasonableness of the order at the reduced rate.*
- 49-52 E. *The experiment would fix non-compensatory rates.*
- 50 It would increase the operating ratio on the same amount of travel to 107.25%.
- 51 Disregarding the burden of clerical expense and taxes, it would cost 2.97 to produce a revenue of 2.88.

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- 51 Fallacy of Commercial Travelers' argument that 2.88 is higher than average fare.
- 52 *No. Pac. R.R. v. No. Dakota*, 236 U.S. 585, considered.
- 52, 53 *F. The experiment discriminates between carriers without evidence of "particular circumstances shown to the Commission" justifying exemption. See also pp. 119-121.*
- 53-57 *G. The order arbitrarily gives to numerous carriers the right to determine for themselves whether they shall come under the order.*
- 55 Chairman Winslow's report to Congress.
- 57 It discriminates against the carriers which are not exempted.
- 58-61 *H. The order is not limited to interstate commerce, but includes journeys within a state.*
- 58 There is no ambiguity justifying construction to save it.
- 59 The House struck out the word "interstate," and the Commission's order applies to "all passenger trains operated by the respondents."
- 60 *Railroad Commission of Wis. v. C., B. & Q. R.R.*, 257 U.S. 563, distinguished.

III.

- 61-65 THE ORDER IS VOID BECAUSE IT DISREGARDED AND VIOLATED SECTION 15a.
- 62 The Commission under 15a fixed the fair rate of return at 5.75% on the valuation. The Eastern group were earning only 3.78%. This experimental order would cut off 6% of their passenger revenue from the same amount of travel.
- 63 Yet section 15a requires the Commission to fix rates which will produce this fair return.
- 64 Section 22 must be administered consistently with section 15a.
- 65 The order cannot be supported under the "reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable."

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IV.

- 65-76 THE COMMISSION WRONGLY CONSTRUED THE AMENDMENT AS REQUIRING "AN ADDITIONAL CLASS OF PASSENGER TRAVEL" TO BE RECOGNIZED.
- 65 Some of the bills in Congress filed in behalf of the Commercial Travelers treated them as a preferred class. Such preference was rejected by Congress.
- 66 Classifications which are proper because related to cost of service—commutation, convention, excursion, and tourist fares.
- 66-69 Such special fares distinguished from interchangeable mileage or scrip-coupon tickets. Opinion of Commissioner Daniels.
- 70 Commutation service is treated as a distinct branch.
- 70, 71 No proper basis for classifying coupon-ticket buyers separately.
- 71, 72 If classed separately at 20% reduction in fare, 10,000,000 persons must each take two additional journeys of 50 miles (the average journey) in order to make up the difference in fare without adding anything even for the cost of carrying them.
- 72 Such extra travel is found by the Commission to be "in the realm of speculation."
- 72, 73 Some considerations suggested by Commercial Travelers' brief.
- 73 Commercial travelers, if they increase their travel by an average of one man per car, will not economically be absorbed into unfilled cars, but will expensively congest the commercial routes.
- 73-74 The possession of \$72 to spend in advance and a business motive for traveling 2500 miles do not justify classification at a lower rate. No analogy to the carload lot.
- 75, 76 No analogy to the present interchangeable transferable scrip-coupon ticket sold at full rate.
- 76 Reduced cost would be the only justification for reduced rates.

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V.

- 76-119 THE ORDER IS AN ARBITRARY AND UNREASONABLE DISCRIMINATION BETWEEN SCRIP-COUPON PASSENGERS AND REGULAR-FARE PASSENGERS, BEYOND THE POWER OF THE COMMISSION, AND LACKING DUE PROCESS OF LAW.
- 77, 78 Though the Amendment, properly construed, is in this respect valid, the Commission has proposed to administer it in an arbitrary and discriminating manner.
- 78 Both the general public and the carriers are hurt by the discrimination,
- 79 which has no reasonable relation to the conditions of travel.
- 80-85 *I.C.C. v. B. & O. R.R.*, 145 U.S. 263, considered.
- 84 The basis of the discrimination is not the service rendered, but the capacity of the traveler to buy.
- 85 Discussion of authorities condemning the principle of the wholesale ticket at a lower rate.
- 86-93 *Lake Shore & Mich. Southern Ry. v. Smith*, 173 U.S. 684.
- 93-99 Other cases illustrating the same point.
- 99-105 *No. Pac. Ry. v. No. Dakota*, 236 U.S. 585.
- 106-110 Arbitrariness condemned.
- 108 *Interstate Ry. Co. v. Mass.*, 207 U.S. 79.
- 110 Dictum of Holmes, J., against favoring "people who could afford to buy 1000-mile tickets."
- 110-112 *Penn. R.R. Co. v. Towers*, 245 U.S. 6.
- 113-116 *Arkadelphia Co. v. St. Louis S.W. Ry. Co.*, 249 U.S. 134.
- 116-119 The *Smith* case, in the light of more recent authorities, now stands for this proposition. The Commission, having prescribed a standard fare for the general public, may adopt classifications which are proper and fix classified rates which are suitable. But it may not create arbitrary classifications and apply arbitrary rates to them. If it does, the carriers as well as the individuals injured may complain.

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VI.

- 119-121 THE STATUTE IS UNCONSTITUTIONAL BECAUSE IT DELEGATES LEGISLATIVE POWER TO THE COMMISSION WITHOUT FIXING ANY STANDARD TO GUIDE ITS ACTION.
- 119-121 The Commission would have been equally within its power under the terms of the Amendment if it had exempted half of the Class 1 railroads and applied its order to the other half.
- 123-138 *Appendix A.*
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- 139-157 *Appendix B.*
- 139-140 Legislative history of the Amendment—in brief.
- 141-145 Remarks by Senator Cummins relating to the final form of the bill, requiring the Commission to find “just and reasonable rates.”
- 145-148 Letter from Commission to Senator Cummins—disapproval of reductions based on “wholesale” theory.
- 150-152 Remarks by Rep. Huddleston—The only evidence showed that these tickets produced no economy and could not be sold at a discount. The Amendment will require increased rates. Congress ought not to give a stone to commercial travelers asking bread.
- 152-153 Rep. Winslow—The Senate never intended to express an opinion on the price.
- 153-154 Rep. Hawes—Travelers’ Association understands that the Commission may raise the rates.
- 154-155 Rep. Newton—in excuse for striking out the word “interstate.” A mileage book good only for interstate travel would be of little benefit to the commercial traveler.
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Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 469.

THE UNITED STATES OF AMERICA ET AL.

v.

THE NEW YORK CENTRAL RAILROAD
COMPANY ET AL.

BRIEF FOR APPELLEES.

Scope of This Brief.

This suit was brought before the District Court of the United States for the District of Massachusetts under the provisions of the Urgent Deficiency Appropriation Act of October 22, 1913 (38 Stat. L. 219), to enjoin, set aside, suspend, and annul an order of the Interstate Commerce Commission entered March 6, 1923. By this order the Commission required all Class 1 railroads in the United States to issue interchangeable scrip-coupon tickets in denominations of \$90, at a reduction of 20% from the face value thereof.

The entire record before the Commission, together with certain affidavits submitted by the carriers and by counsel for the traveling salesmen, was introduced before the District Court. It was agreed that the cause should be deemed submitted for final hearing. After extended oral

arguments by all parties the District Court granted the petition and issued a permanent injunction against the enforcement of the order.

The United States, the Interstate Commerce Commission, and certain individuals and organizations representing commercial travelers appealed from this decree. Certain other organizations of commercial travelers, not parties to the proceedings before the District Court, have appeared and filed briefs as *amici curiae*.

The District Court granted the petition and enjoined the enforcement of the order on the ground that it was made by the Commission under a misapprehension of the meaning of the Act of Congress and without proper findings or an adequate record as a basis for its action. The petitioners had urged not only this ground, but several others, in opposition to the validity of the order. The court did not pass upon any of the other grounds except that it went out of its way to express its disagreement with one contention of the petitioners regarding the constitutionality of the statute.

Believing that the court was right in enjoining enforcement of the order on the ground upon which it based its action, and believing also that the order is invalid for several other reasons, as urged by them before the District Court, the appellees will discuss in this brief several reasons why, as they contend, the injunction should stand. Briefly summarized, their contentions are as follows: (1) the District Court was correct in holding that the Commission erred in its interpretation of the statute as requiring a reduction in fare; (2) the order is void because the Com-

mission's findings show that there was no substantial evidence to support it, it was admittedly experimental and the experiment cannot produce any better evidence than was available when the order was made; (3) the order is void because it imposes unreasonable burdens upon the railroads, prescribes rates which are non-compensatory, creates an unjustifiable discrimination between railroads, and applies to intrastate commerce; (4) the order is void because the Commission therein delegated legislative powers to certain railroads; (5) the order is void because it violates the provisions of section 15a of the Interstate Commerce Act; (6) the Commission erred in construing the statute as requiring the recognition of an additional class of passenger travel; (7) the order is void under the Fifth Amendment to the Constitution because it creates arbitrary and unreasonable discrimination between passengers who have the desire and the money to buy 2500 miles of transportation in advance and those who have not; (8) the statute is unconstitutional because it delegates legislative power to the Commission without fixing any standard to guide the Commission's action.

Statement of Facts.

The order in suit purported to be made pursuant to paragraph 2 of the Act of Congress approved August 18, 1922 (42 Stat. L. 827), amending section 22 of the Act to Regulate Commerce. Paragraph 2 reads as follows:

“(2) The commission is directed to require, after notice and hearing, each carrier

by rail, subject to this Act, to issue at such offices as may be prescribed by the commission interchangeable mileage or scrip coupon tickets at just and reasonable rates, good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The commission may in its discretion exempt from the provisions of this amendatory Act either in whole or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made. Such tickets may be required to be issued in such denominations as the commission may prescribe. Before making any order requiring the issuance of any such tickets the commission shall make and publish such reasonable rules and regulations for their issuance and use as in its judgment the public interest demands; and especially it shall prescribe whether such tickets are transferable or nontransferable, and if the latter, what identification may be required; and especially, also to what baggage privileges the lawful holders of such tickets are entitled."

The Commission interpreted this amendment as a mandate from Congress to require carriers to sell such interchangeable tickets at a rate less than the standard fare, and, basing their order upon such interpretation, issued their order requiring such tickets to be sold at a discount of 20%.

The amendment under which the Commission purported to act appears from the record to have been passed at the behest of and for the

benefit of commercial travelers, representing a large number of business houses and whose organization in numbers and influence the Commission appeared to think was strong enough to obtain such discrimination in their favor. The record as made by the Commission does not disclose that such persons are needy or are engaged in any charitable or educational pursuits or constitute any special class of traffic such as commutation, excursion, or convention travelers, but comprise persons who are possessed of a substantial amount of money, who travel for business organizations amply able to pay the standard fare, and who under the privileges of the proposed ticket would enjoy all the accommodations for person and property afforded by all passenger-carrying trains on all Class 1 railroads, while the privilege of traveling at the reduced rate would be denied to all persons who are unable to afford the sum of \$72 in contemplation of travel within the year amounting to 2500 miles.

The history of the mileage ticket as described by the record before the Commission clearly shows that it had its origin in a desire and attempt of carriers to make discriminations and grant advantages and concessions to shippers of freight at a time when discrimination and concession was common (Record, pp. 23, 118-121). From time to time since the passage of the original Commerce Act in 1887 Congress has by repeated enactments and the most emphatic language prohibited, with severe penalties, granting discriminatory passenger rates under any terms or circumstances to any persons whatsoever. The only exceptions to these prohibitions have been

limited to persons specifically defined by Congress, namely, to ministers of religion, to municipal governments for the transportation of indigent persons, and to inmates of national homes for soldiers and sailors (see Transportation Act, sec. 22, 25 Stat. L. 855). The enactments of Congress directed to absolutely prevent abuses of discrimination between persons, which had long been the subject of complaint, are aimed at every conceivable form which such discrimination has been or may be found to take. (Appendix E hereof sets forth at length the sections of the statute which are discussed in this brief.)

By section 1, paragraph 4, of the Commerce Act as amended (41 Stat. L. 474) it is the duty of every carrier to establish just and reasonable fares. By paragraph 5 every unjust and unreasonable charge is prohibited and declared unlawful. By paragraph 7 free transportation is prohibited except in specified instances. By section 2 (41 Stat. L. 479), as amended February 28, 1920, any carrier who directly or indirectly by any special rate, rebate, drawback, or other device charges, demands, collects, or receives from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service under substantially similar circumstances and conditions shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

By section 3 (41 Stat. L. 479) as amended February 28, 1920, it is unlawful for any carrier

to make or give any undue or unreasonable preference or advantage to any person or any particular description of traffic in any respect or to subject any person or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

By section 3, paragraph 3, carriers are prohibited from discriminating in fares and charges between connecting lines.

By section 6, paragraph 7 (34 Stat. L. 584), it is provided that no carrier shall refund or remit in any manner or by any device any portion of the fares charged or extend to any person any privileges or facilities except such as are specified in its tariffs filed with the Commission.

By section 8 (24 Stat. L. 379) carriers are made subject to liability for the full amount of damages sustained in consequence of any violation of the foregoing provisions, together with reasonable attorney's fees to be taxed as part of the costs.

By section 10 (41 Stat. L. 483) any common carrier and any director or officer or agent of such carrier who violates any of the foregoing provisions is subject to a fine of not exceeding \$5000 for each offense, and imprisonment in the penitentiary for a term not exceeding two years.

The foregoing are among the prohibitions of Congress, but by no means exhaust the record of its prohibitions, against discriminations between persons using the carriers' transportation service.

A brief history of the rates involved in this

matter will aid in understanding the situation. We quote from the Commission's opinion herein (Record, p. 22):

"Prior to Federal control the standard fare for interstate travel was in the greater part of the country approximately 2.5 cents per mile. For intrastate travel it was 2 cents per mile in many States. In some parts of the country, more particularly in the southern and western districts, the standard fare, both state and interstate, was higher than 2.5 cents.

"In June, 1918, the Director General established the minimum standard fare of 3 cents per mile, both state and interstate, for application by railroads under Federal control. In August, 1920, the standard fare was increased 20 per cent, or to 3.6 cents per mile."

The Commission's action in August, 1920 (*Increased Rates, 1920*, 58 I.C.C. 220), permitted an increase of 20% in all passenger fares then in existence, thus establishing the fares which were at that time considered by the Commission to be just and reasonable for each sort of passenger service.

In 1922 the Commission investigated the general rate situation throughout the country and ordered a reduction of 10% in freight rates, but, though importuned to reduce passenger fares, refused to make any change therein (*Reduced Rates, 1922*, 68 I.C.C. 676). It thus reaffirmed its earlier decision as to what were the just and reasonable passenger fares for each sort of ser-

vice, including the standard basic fare of 3.6 cents per mile.*

These just and reasonable passenger fares were established by the Commission pursuant to the mandate of Congress in the Transportation Act of 1920, section 15a (41 Stat. L. 488). Under the authority of that provision the Commission fixed the fair rate of return upon the property used by the carriers for transportation service at 6%. On the basis of the tentative valuation of the transportation property of the carriers, the Commission determined the just and reasonable rates necessary to produce this fair return. In its decision in 1922 the Commission reduced the rate of fair return to 5.75%, but found, as we have stated above, that the existing passenger fares should be maintained as the just and reasonable fares for the purpose of producing that rate of fair return.

There has been no change in the authorized rate of passenger fares since the Commission's decision in 1922, unless the order herein is to be regarded as such. This we shall show is not the case.

* This court has previously recognized the Commission's action in establishing 3.6 cents per mile as the standard just and reasonable fare. See *Wisconsin R.R. Com. v. C., B. & Q.*, 257 U.S. 563; *New York v. United States*, 257 U.S. 591. (See also *South Carolina Fares and Charges*, 60 I.C.C. 290, 292; *Nebraska Rates, Fares, and Charges*, 60 I.C.C. 305, 307; *Indiana Rates, Fares, and Charges*, 60 I.C.C. 337, 340; *North Carolina Fares and Charges*, 60 I.C.C. 362, 364; *Louisiana Rates, Fares, and Charges*, 60 I.C.C. 467, 470; *Kansas Rates, Fares, and Charges*, 62 I.C.C. 440, 442; *Michigan Passenger Fares*, 60 I.C.C. 245; *Montana Rates and Fares*, 60 I.C.C. 61, 62; *Intrastate Rates within Illinois*, 59 I.C.C. 350; *Arkansas Rates and Fares*, 59 I.C.C. 471; *Ohio Rates, Fares, and Charges*, 60 I.C.C. 78; *Minnesota Fares and Charges*, 59 I.C.C. 502, 504; *Wisconsin Passenger Fares*, 59 I.C.C. 391, 393.)

Upon the record in the instant case the Commission found that the net railway operating income of the Class 1 carriers in the Eastern Group for the seven months ending July 31, 1922, was only 4.76% (Record, p. 21). The seven months ending July 31, 1922, represented the latest period for which statistics were available at the time of the proceedings before the Commission. The petitioners and the intervening petitioners before the District Court, and the appellees herein, are substantially the same as the Class 1 carriers in the Eastern Group. The record before the District Court and the record herein shows that for the entire year 1922 the rate of return on the tentative valuation of the Class 1 carriers of the Eastern Group was even less than that for the first seven months of the year, being but 3.78% (Record, p. 69). It thus appears that the rate of return received by these carriers falls far below the fair return established by the Commission in 1920 and 1922 pursuant to the mandate of Congress.

The Commission's order in suit would tend still further to reduce the net railway operating income of the Class 1 carriers in the Eastern Group below the fair return for which Congress directed the Commission to provide.

The interchangeable mileage or scrip ticket, which had its inception in the desire to give concessions and rebates, had long been condemned by the carriers (Record, p. 23). It was abolished by the Director-General on June 10, 1918, and has never been re-established at a reduced rate, although coupon tickets at the standard rate have been used since that time

interchangeable over all roads which care to participate in the use thereof (Record, pp. 23, 24).

The loss to the appellees herein which it is estimated would result from the Commission's order complained of is approximately \$32,000,000 a year (see *infra*, p. 62).

The record shows that, excluding commutation service, which is now recognized by the Commission as a separate branch of the carriers' business, the standard fare of 3.6 cents per mile has been approximately realized by the carriers. Page 1 of Exhibit 50, an exhibit prepared and introduced into this record by the Commission itself (see Record, p. 160), shows that the average revenue per passenger mile for all traffic, excluding commutation, is 3.481 cents. This figure is for the first six months of 1922, which are shown by the same Exhibit not to differ relatively from the figures for 1921. The passenger miles which yielded this revenue constituted 13/16 of the whole passenger service (p. 1, Exhibit 50, Items 19,* 26, and 29). In other words, commutation traffic amounts to only about 19% of the total passenger traffic, and the other 81%, which includes excursion and tourist fares, yields to the carriers 3.481 cents per passenger mile.

It is a matter of general knowledge that the cost of commutation service, with its large utilization of equipment, its heavy loading per car, and its absence of the expense of handling baggage and Pullman service, is substantially

* It is apparent that items 26 and 29 are stated in thousands of miles, because their total would not otherwise equal item 19.

lower than the cost of ordinary passenger service. It is therefore fair to assume that the operating ratio for passenger traffic other than commutation is at least as great as that found by the Commission for the entire passenger service. For the year 1921 this was 85.24% (Record, p. 21).

Assuming this operating ratio for passenger service other than commutation, it is apparent that out of the revenue of 3.481 cents received from every passenger carried one mile, it costs the railroads 2.97 cents to transport him (85.24% of 3.481 cents).

If it costs the railroads 2.97 cents a mile to transport a passenger, and if the new tickets are sold for 2.88 cents a mile, it is evident that the actual out-of-pocket loss to the carriers will be 9/10 of a mill per mile. And this does not allow for any additional cost to the carriers in the handling of the new tickets.

These computations, which are based upon actual figures in the record, show the fallacy of the argument suggested in the brief for the International Federation of Commercial Travelers Organizations at pages 36 ff. and 104 ff. The computations in that brief are based upon estimates rather than on the actual figures to be found in the record. For example, the figure of revenue per passenger mile for all traffic is computed as 3.03 cents, whereas Exhibit 50, to which we have referred above, expressly shows for all traffic 3.086 cents for the year 1921, 3.127 cents for the first six months of 1921, and 3.049 cents for the first six months of 1922. All computations of the Commercial Travelers are

based upon the entire passenger traffic, and do not exclude the commutation traffic. As we have stated, Exhibit 50 shows the figures for passenger traffic other than commutation for the first six months of 1922. It is manifestly unfair to include the low commutation figures for revenues and costs in any general computation bearing upon the adequacy of a rate for a service which has no relation to commutation. Obviously no one is going to use a scrip ticket costing 2.88 cents in place of a commutation ticket costing on an average slightly over 1 cent. Furthermore the Commission has not only sanctioned, but required, the separation of commutation traffic from other passenger traffic in the carriers' returns (see p. 70, *infra*).

It appears by the record that the cost of printing, selling, and accounting will be greater in the use of these interchangeable scrip tickets than in the use of the standard-form ticket to the extent of at least \$1,680,000 a year, and that the work of collecting and handling the tickets will be increased by a very considerable, but indefinite, amount, due to the greater burden upon the ticket sellers, ticket collectors, and passenger agents, and the necessary incidents of policing to prevent scalping and transferability (Record, pp. 110-116). It must be remembered, further, that before any of the additional expense involved in handling these tickets or any of the loss to the carriers in selling them at a reduced rate can be made up, there must be an increase in travel on the part of the users of these tickets to the extent of 25%, because any one who purchases 2500 miles of transpor-

tation for the price of 2000 miles as a practical matter receives free transportation to the extent of 500 miles, or 25% of the amount of transportation for which he has paid.

The tickets prescribed by the order are to be sold at the rate of 2.88 cents per mile. If the actual cost to the carriers of transporting each passenger one mile is 2.97 cents, as we have indicated above, and if that cost is materially increased by the additional expense involved in handling these tickets, it is obvious that the cost of the service rendered to holders of these tickets will be very substantially greater than the price at which they are sold. In other words, the rate will be actually both non-compensatory and confiscatory.

An examination of the rules and regulations which the Commission has prescribed immediately shows how much the work and cost of issuing these tickets are increased over the single one-way ticket (Record, pp. 47-54). The ticket agent must paste a photograph of the purchaser on the ticket. He must procure the signature of the purchaser. The ticket agent must sign it himself. The ticket agent must write in the name, business occupation, and residence of the purchaser. When the ticket agent issues the exchange passage ticket he must mark it "scrip," with the number of the scrip book written on the ticket in ink. When the ticket is presented for transportation the ticket agent must detach sufficient coupons and issue the ordinary one-way ticket. Where the passenger takes a train at a non-agency station the conductor of the train must endorse on the back of the coupons lifted the names or num-

bers of the stations between which the coupons are honored. He must examine the scrip book to identify the passenger with the photograph. When baggage is to be checked the exchange passage ticket and the scrip-coupon book must be presented to the baggage agent. Wholly or partially used scrip books must be redeemed by the issuing carrier. Whenever a scrip book or exchange passage ticket is presented for any purpose the holder must be identified as the original purchaser to the satisfaction of the officer or agent.

Whether the sale of such tickets will produce a larger volume of traffic the Commission finds to be wholly a matter of speculation (Record, pp. 27, 28). Experience of the past does not justify any finding that the volume of passenger travel will be increased to any such extent as to offset the perfectly obvious and determinable losses entailed by the order (Record, p. 28). As an illustration, the removal on January 1, 1922, of the war tax of 8% on passenger fares did not measurably stimulate passenger travel during the next six months (Record, p. 25). On the contrary, passenger traffic declined very appreciably in volume during that period (Record, p. 22). The carriers in the Eastern Group would have to perform well over one billion additional passenger miles of service to merely make up the loss of revenue (see p. 71, *infra*). The Commission finds that there is no analogy between the wholesale principle in the mercantile world and the wholesale sale of transportation as represented by the interchangeable ticket (Record, p. 26). In fact, the ticket is bought at wholesale, but the service ren-

dered is a retail service. The order is confessedly an experiment, and is so described by the Commission (Record, p. 28).

While the provisions of the amendment permit the Commission to make certain exemptions upon evidence submitted, the Commission's order is applicable to all Class 1 carriers; all others are exempted, and the exemption is based upon little or no evidence (Record, p. 29). And the Commission, after exempting all except the Class 1 carriers, permits any exempted carrier to issue interchangeable coupon tickets, and thus impose upon the Class 1 carriers all the risks of giving transportation upon the credit of an indefinite number of possibly irresponsible small roads all over the United States. The Class 1 carriers are required to issue these tickets at the reduced rate and bear the burden of printing, selling, and accounting for the proceeds, although the purchaser may never travel a mile upon the lines of the selling carrier.

Argument.

I.

THE COMMISSION ERRED IN CONSTRUING THE
AMENDMENT TO REQUIRE THE CARRIERS TO ISSUE
INTERCHANGEABLE TICKETS AT REDUCED RATES.

The District Court found that the Commission in making its order misinterpreted the statute under which it purported to have acted. A comparison of the report of the Commission with the language of the statute and the opinions of the dissenting Commissioners clearly bears out this conclusion of the District Court.

The Commission in the early part of its report indicates that it recognizes that the statute does not require, either expressly or by intimation, a reduction in rate. (This point is emphasized in the brief for the International Federation of Commercial Organizations, at p. 27, but that brief appears to overlook the contradiction between the early language of the Commission and that used in the latter part of its report.)

At pages 20 and 21 of the record the Commission points out that one of the questions to be determined by it is what is the just and reasonable rate for the proposed tickets. It comments upon the fact that the statute is mandatory in requiring interchangeable tickets, but that it is left to the judgment of the Commission to determine the rate at which such tickets shall be issued.

In its conclusion, however, the Commission uses the following language:

"The amendment to the act pursuant to which this proceeding was instituted does not upon its face indicate upon what basis an interchangeable mileage or scrip ticket should be issued. The spirit and the apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare" (Record, p. 27)—

and again:

"In addition to the obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established, at least for an ex-

perimental period. In no other way can the apparent purpose of the law be given practical effect" (Record, p. 28).

Commissioner Daniels, who dissented in part, agrees with the majority in their interpretation that a reduction is required by the statute. At page 33 of the record he said:

"I think it difficult, if not impossible, to escape the conclusion that the intent of the amendment was to require us to prescribe in connection with mileage books or scrip coupon books a fare per mile less than the basic fare of 3.6 cents per mile."

The passages just quoted from the majority opinion of the Commission lead the District Court to remark:

"It is clear from the record that the commission proceeded on the assumption that the spirit and theory of the congressional amendment required them to order the scrip coupons to be issued at reduced rates" (Record, p. 91).

The court points out that there is nothing in the record to show that the Commission would have reached this conclusion had it not been for "what it conceived to be the plain spirit and theory of the amendment." The court expresses uncertainty as to whether the majority of the Commission interpreted the Act as mandatory in regard to a reduction of the rate, or whether they acted—

"upon an assumed desire of the Congress,

though not expressed by the amendment in mandatory form, that they should"—

reduce the rate, holding that in either case the Commission's action was without warrant of law (Record, p. 92).

That the court correctly understood the Commission's language and action appears from the dissenting opinions of Commissioners Hall and Eastman. The former, at pages 31 and 32 of the record, said:

"On the record now before us it was not shown, indeed there was no attempt to show, that this basic fare is not still just and reasonable. On the contrary, the whole showing was based on the premise that this basic rate should be retained, but that some passengers, those who purchased these tickets, should receive transportation at lower rates than other passengers.

"One after another the grounds on which this was urged are dismissed by the majority as unsubstantiated until the 'class' theory is reached. That, and the 'obvious spirit' or 'apparent purpose' of the statute, as the majority see it, alone support their finding that the rates resulting from sale of scrip coupon books in the denomination of \$90 at a reduction of 20 per cent will be just and reasonable for this class of travel.

...

"The majority say:

"The spirit and the apparent theory of the law is that carriers shall be required

to sell such a ticket at something less than the standard fare, . . .'

"That requirement was omitted from the bill before it became law. In place of it was substituted the direction to us to require, after hearing, issuance and acceptance of tickets at just and reasonable rates. I submit that the fairer construction of the act is that the Congress expected us to determine in this case, as in any other, what the just and reasonable rate would be. If that rate is the standard rate—and to my mind nothing in this record shows that any lower rate would be just and reasonable—we should prescribe that rate and give our reasons in our report. . . .

"Special privilege dies hard, and the craving for it never dies. But I see no good reason why, reading the act as it is written, we should give to it the gloss for which these organizations contend. . . .

"That the conclusion reached by the majority is in legal effect arbitrary and based upon an erroneous conception of this commission's powers and duties seems to me apparent from the report itself, which classifies not only passengers but carriers according to their means. The record contains nothing which convinces me that the use of this form of ticket will reduce the cost of service and therefore entitle the holder to a lower rate. The report does not so find, as I read it."

Commissioner Eastman, at page 38 of the record, said:

"The conclusion of the majority is founded upon two premises:

"(1) That the 'spirit and the apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare'.

"(2) That the reduced fare will stimulate traffic.

"With reference to the first premise: The law merely directs us to require carriers to issue 'interchangeable mileage or scrip coupon tickets at just and reasonable rates'. Nothing is said about rates 'less than the standard fare', and I am not ready to believe that Congress wished us to imply something which it was unwilling to say openly."

On the basis of the majority's interpretation of the statute, the Commission purported to find—

"that the rates resulting from that reduction will be just and reasonable for this class of travel" (Record, p. 28).

In contrast with this so-called "conclusion" we call attention to the express findings of the Commission, summarized at length at page 36 of this brief, which indicate, as Commissioner Hall pointed out in the passage just quoted, that one by one the arguments adduced by the proponents of the reduced rate were found by the Commission to have no weight.

The only possible justification which the majority found as a basis for the reduction of rates

was the hope that traffic might thereby be sufficiently stimulated to make up the loss in revenue. As we shall show hereinafter, not only is this hope absolutely unsupported by anything in the nature of evidence, but it rests, as the Commission itself admitted, in the "realm of speculation," and it constitutes an experiment which the Commission, absolutely without justification of any sort in the record or in the statute, attempts to force upon the railroads.

Counsel for the Commission has attempted to show that the Commission did not act under any misinterpretation of the Act or upon any assumed intention of Congress. His brief, at page 19, disclaims any intention of contending that the statute should be interpreted in a manner to do violence to its language, but asserts that the expression of the opinion by the Commission that Congress expected it to prescribe a rate lower than the existing standard rate "is not the equivalent of such an interpretation." The Commission surely cannot find in the language of the Act any statement by Congress that it expects the rate to be less than the established standard. The brief practically admits in the passage just referred to that the Commission did act upon the supposition of such an expectation by Congress. What better justification could be found for the District Court's analysis of the basis of the Commission's action than this argument contained in the Commission's own brief?

The statute does not say that the tickets shall be issued at reduced rates. It requires "just and reasonable rates." On its face there is no

reason for assuming that Congress intended to require the Commission to reduce the rates.

The Commission, however, by going outside the language of the statute, found in the debates of Congress what appealed to the majority as a valid reason for interpreting the Act to require a reduction in rate. This was manifestly error. No rule of statutory construction is better settled than that a statute must be interpreted without outside aid if its meaning is clear. This court has repeatedly held that only when a statute is ambiguous is there any warrant for looking at its legislative history to determine its meaning. *R.R. Commission of Wis. v. C., B. & Q.*, 257 U.S. 563; *Penn. R.R. Co. v. International Coal Co.*, 230 U.S. 184, 198; *Caminetti v. United States*, 242 U.S. 470, 490.

If the legislative history of this particular statute is to be considered, however, it indicates beyond doubt that the Commission entirely mistook the intent of Congress. It is true that there was considerable agitation before committees of Congress and on the floor of Congress for an amendment to the Interstate Commerce Act which would provide for reduced rates for commercial travelers.

The history of the legislation finally embodied in the amendment of August, 1922, shows that some fourteen different bills were introduced in April and May of 1921, some in the Senate and some in the House, some of them suggesting the establishment of interchangeable mileage tickets for the use of commercial travelers at a rate 20% less than the regular rate of passenger fares, some of them suggesting inter-

changeable five thousand mile tickets to be sold at $2\frac{1}{2}$ cents a mile, and some suggesting interchangeable tickets of one thousand, two thousand, and five thousand miles, to be sold at a reduction of $33\frac{1}{3}\%$ from the regular passenger rate. All of these bills went to the respective Interstate Commerce Committees of the two Houses, with the result that Senate Bill 848 was reported out of the Senate Interstate Commerce Committee and provided for interchangeable non-transferable five thousand mile tickets to be sold at the rate of $2\frac{1}{2}$ cents per mile. This bill was, however, amended in the Senate on the motion of Senator Cummins by the elimination of all mention of a reduced rate and a substitution of the words "at just and reasonable rates." In Appendix A of this brief we set forth the fourteen bills referred to, and in Appendix B a summary of the legislative history of the statute, together with some of the comments made upon it by committee members and spokesmen.

The bill does not undertake to define any new class of travelers. All mention of commercial travelers has been eliminated.

It is highly significant that during the very period when this bill was under discussion by Congress, on May 16, 1922, the Interstate Commerce Commission gave expression to the following oft-repeated doctrine:

"We have no authority to require carriers to establish for particular passengers or particular occasions special fares lower than the regular fares" (*Reduced Rates, 1922, supra*, p. 729).

As we shall show elsewhere (*infra*, pp. 30-34), this doctrine, based on section 22 of the Commerce Act, has been universally recognized and enforced by both the Commission and the courts, and Congress must be assumed to have had it in mind in amending that section.

It is a cardinal rule of statutory construction that a provision eliminated by Congress in its consideration of legislation shall not be inserted by a court, or an administrative officer or tribunal, by implication. *United States v. D. & H. Co.*, 213 U.S. 366, 414; *Southern Ry. v. United States*, 222 U.S. 20, 25; *Penn. R.R. Co. v. International Coal Co.*, 230 U.S. 184, 198; *Lapina v. Williams*, 232 U.S. 78, 89; *Carey v. Donahue*, 240 U.S. 430, 436; *United States v. St. P., M. & M. R.R.*, 247 U.S. 310, 318.

The words "just and reasonable rates" are the same words used in section 1, paragraphs 4 and 5, of the Commerce Act (41 Stat. L. 474), which require every common carrier to establish "just and reasonable rates and fares" and that all charges made for service rendered in the transportation of passengers shall be "just and reasonable."

By section 15 the Commission is authorized to determine and prescribe what will be "just and reasonable" fares or rates (41 Stat. L. 484).

By section 15a, paragraph 2 (41 Stat. L. 488), it is provided as follows:

"In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or terri-

tories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

The statute now under discussion is an amendment to the Commerce Act. The words "just and reasonable rates" in this amendment must have the same meaning that they have in other portions of that Act. The amendment was enacted with full knowledge by Congress of the meaning which prior legislation and administration had attached to the phrase, and of the action of the Commission in August, 1920, and in May, 1922, in establishing and maintaining 3.6 cents per mile as the basic just and reasonable passenger rate. The debates in Congress occurred both before and after the latter decision of the Commission, and the statute in question was enacted on August 18, 1922.

By every recognized canon of statutory construction the amendment in its use of the language "just and reasonable rates" referred to the same sort of standard that the Commission had previously applied in rate making. It cannot

be construed as a direction to the Commission either to lower or to increase rates unless the ordinary criterion of justness and reasonableness so requires. "Where provisions of a statute had previous to their reënactment a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary." *Heald v. District of Columbia*, 254 U.S. 20, 23. (See also *National Lead Co. v. United States*, 252 U.S. 140, 146; *Louisville Cement Co. v. I.C.C.*, 246 U.S. 638, 644; *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187, 199; *Latimer v. United States*, 223 U.S. 501, 504; *United States v. Bailey*, 9 Pet. 238, 256.)

The whole history of the Interstate Commerce Act and its various amendments discloses the vehemence with which Congress has always legislated against discriminatory rates. The comprehensive manner in which all possible kinds of discrimination have been provided against and the severity with which they have been punished absolutely preclude the inference that Congress, after thirty-five years of struggle to suppress discrimination and make it impossible, should itself have legislated with the object of producing discrimination—and discrimination in favor of a class of persons who should be the last class in the world to be so favored, because the members of that class are amply able to pay the standard fare. On the other hand, the class discriminated against consists of the working man and woman, the artisan, the occasional traveler, and all those who have not \$72 available to take advantage of the reduced rate.

As we have pointed out above, Congress had

itself, by section 22, of which the amendment became a part, defined the classes of persons who might be favored by the carriers in respect of reduced rates. The persons so defined were ministers of religion, indigent persons, and inmates of soldiers' and sailors' homes.

While it was suggested by the court in *Interstate Commerce Commission v. Baltimore & Ohio Railroad*, 145 U.S. 263, that the above-mentioned classes were illustrative rather than exclusive, it cannot be doubted that any extension of these classes must be based upon a clear showing of a proper relation between the favored class and the cost of transportation of such class, that is to say, if the classes defined in section 22 are to be in any wise extended by judicial interpretation, either of the Commission or the court, they can be extended only to those classes which can be brought within a well-defined principle, justified either by direct reduction in cost of service or by indirect reduction in cost of service by reason of stimulation of travel.

It is incredible that, when Congress has rejected during a discussion of the measure express provisions for a reduced rate, and substituted language which points not at all to a reduced rate, it intended the Commission to imply an intention to create a new class of travel to be carried at a reduced rate.

It is conspicuous from the Commission's report that it established a reduced rate for interchangeable scrip-coupon tickets, not at all because of any merits of the case of those who seek such reduced rate or any convincing gain to be made by the carriers which is outside the realm of speculation, but simply and solely be-

cause the Commission conceived that Congress had given it a mandate to order reduced rates for that class of persons who could afford to buy transportation at wholesale and who had \$72 in their pockets to pay for it.

The inequity and injustice both to the carriers, who lose a large amount of revenue, and to the very large class of persons who are unfairly discriminated against has been again and again condemned by Congress and by the courts.

The statute gives to the Commission the power to prescribe in its discretion "whether such tickets are transferable or non-transferable." This language is enough in itself to show the Commission's error in interpreting it as requiring a reduction in rate. If Congress had so intended, it would not have given the Commission discretion to make such tickets transferable. A transferable ticket at a reduced rate, no matter in what denomination, would immediately supplant the standard-rate tickets. No one would pay a dollar for a standard ticket when he could participate in the use of a ticket purchasable for less than a dollar. It is clear from this provision that Congress contemplated at least a possibility that these interchangeable tickets would be issued at the full standard rate.

It must be borne in mind that the statute under which the Commission purported to make this order is an amendment to section 22 of the Act to Regulate Commerce. This, of course, indicates that it has a special relation to that section and makes it necessary that its history and interpretation be briefly discussed.

Section 22, as originally enacted in 1887, and amended in 1889 and 1895 (24 Stat. L. 387; 25 Stat. L. 862; 28 Stat. L. 643), is given in full in Appendix E hereof (p. 191). The Act of August 18, 1922, now under consideration, made no change in the language of the section, but gave it a paragraph number, and added paragraphs 2 and 3 (42 Stat. L. 827). (See App. E, p. 193.)

The meaning of what is now paragraph 1 of section 22 has been recently discussed by this court in the case of *Nashville, C. & St. L. Ry. v. Tennessee*, 262 U.S. 318. At pages 323 and 324 the court said:

“Section 22 must in this matter, as in others, be read in connection with the rest of the act, and be interpreted with due regard to its manifest purpose [citing cases]. Congress did not intend, by this provision concerning reduced rates and free transportation, to create an instrument by which a carrier was authorized, in its discretion, to subject interstate commerce to undue prejudice, or by which the State was empowered to compel the carriers so to do. The object of the section was to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travelers, in the matters therein recited, is not necessarily prohibited. And in this respect its provisions are illustrative, not exclusive. It limits, or defines, the requirement of equality in treatment which is imposed in other sections of the Act. By so doing, it preserves the right of the carrier theretofore enjoyed of granting, in its discretion, preferential

treatment to particular classes in certain cases. Only in this sense can it be said that the section is permissive. It confers no right upon any shipper or traveler. Nor does it confer any new right upon the carrier. . . .

"There is nothing in *Interstate Commerce Commission v. B. & O. R.R. Co.*, 145 U.S. 263, 278; *L.S. & M.S. Ry. Co. v. Smith*, 173 U.S. 684; or *Penn. R.R. Co. v. Towers*, 245 U.S. 6, inconsistent with the views expressed above. The decisions made by the Interstate Commerce Commission are in substantial harmony with them."

A footnote explaining the reference to the decisions of the Interstate Commerce Commission referred to at the end of the above quotation reads as follows:

"Section 22 has been construed by the Commission as conferring upon carriers such permission to furnish transportation at reduced rates or free, in certain cases; as not conferring upon any shipper or traveler a right to such transportation; and, ordinarily, as not conferring upon the Commission power to establish such exceptions to the normal rates and fares [citing ten I.C.C. decisions]. Conference Rulings provide, as to some reduced rates under section 22, that they must be filed and posted with the Commission; and as to others that they need not be. See Conference Rulings, Issued Nov. 1, 1917, Nos. 33, 36, 208e, 218, 244, 311, 452."

Abstracts of and quotations from the ten decisions of the Interstate Commerce Commission cited in this footnote will be found in Appendix C of this brief. The Conference Rulings referred to, together with two or three others on the same subject, will be found in Appendix D.

In addition to the ten I.C.C. decisions, exhaustive search has disclosed the following, which bear upon the subject under discussion:

In re Mileage, Excursion and Commutation Tickets, 23 I.C.C. 95, 96.

Carnegie Board of Trade v. Penn. R.R. Co., 28 I.C.C. 122, 128, 129.

In re Mileage Books, 28 I.C.C. 318, 323, 324.

Rules and Regulations Governing the Checking of Baggage on Combination of Tickets, 35 I.C.C. 157, 160.

N.Y. Com. of Highways v. Director-General, 55 I.C.C. 619, 624.

Reduced Rates, 1922, 68 I.C.C. 676, 729.

In no one of these decisions or those cited in the footnote to the *Tennessee* case, and in no Conference Ruling, has it ever been held or suggested that any traveler or shipper had a right to compel any carrier to furnish it free or reduced transportation, or that the Interstate Commerce Commission had any power to require the carriers to furnish free or reduced transportation, except in the case of commutation tickets where carriers had previously, of their own volition, established such tickets.

The situation with regard to commutation traffic is in some respects unique. It had been

suggested by the Interstate Commerce Commission that commutation rates might be required of the carriers in cases where they had previously established such rates of their own volition and where a commutation business had grown up thereunder (*Commutation Rate Case*, 21 I.C.C. 428). This court in *Penn. R.R. Co. v. Towers*, 245 U.S. 6, approved that doctrine in an opinion which carefully differentiated commutation service which had been fostered and encouraged by the voluntary action of the railroads from other forms of special tickets, including mileage tickets at reduced rates.

The conclusion of the court, as expressed on page 17, is that the expressions of this court in the case of *L.S. & M.S. R.R. Co. v. Smith*, 173 U.S. 684, must be modified if and to the extent that they are inconsistent "with the right of the States to fix reasonable commutation fares when the carrier has itself established fares for such service." In brief, this court, in making the exception to the general rule, recognizes that the railroads cannot be compelled to grant a reduction in rates for a special type of service except in the case of commutation rates where the carriers have previously voluntarily established them, and only in that case.

It is not without significance that the International Federation of Commercial Travelers Organizations, in its brief herein filed as *amicus curiae*, at page 84, expressly admits that prior to the enactment of the amendment to section 22, in August, 1922, "it is possible that the Commission did not have the affirmative authority to require scrip book coupon tickets to

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be issued at reasonable rates." *A fortiori* the Commission had no such authority to require such tickets to be issued at reduced rates.

To summarize, the interpretation of paragraph 1 of section 22 has always been that it does not give to the Interstate Commerce Commission any power to compel the railroads to grant a reduced rate to any particular class of traffic, with the single exception of commutation service which has previously been voluntarily established by the carriers.

It is this section as so interpreted to which the amendment of August 18, 1922, was added. The language of that amendment, which became paragraph 2 of section 22, does not state that the Commission shall have power to require the carriers to issue interchangeable mileage or scrip tickets at reduced rates. It does not change in any respect the rights of the carriers under paragraph 1 of the section, or the authority of the Commission.

II.

THE ORDER IS VOID BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT IT, AND BECAUSE THE COMMISSION'S ACTION IN MAKING IT WAS ARBITRARY AND BEYOND ITS AUTHORITY.

It is fundamental that, where an administrative tribunal acts outside the scope of the authority conferred upon it by statute, or acts in an arbitrary manner, its action is invalid and void. In the present case the Interstate Commerce Commission did so act, for the following reasons:

A. There was no evidence to support its conclusion and order.

- B. Its order is admittedly experimental.
- C. The experiment cannot produce any better evidence than was available when the order was made.
- D. The order imposes unreasonable burdens upon the railroads.
- E. The rates prescribed are non-compensatory.
- F. The order creates an unjustifiable discrimination between railroads.
- G. The Commission delegated to certain railroads legislative power.
- H. The order applies to intrastate commerce.

A. The Commission's conclusion as stated on page 28 of the record is:

"In addition to the obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established, at least for an experimental period. In no other way can the apparent purpose of the law be given practical effect. . . . We further find that the rates resulting from that reduction will be just and reasonable for this class of travel."

We have here an attempt to justify by an empty finding of reasonableness an order which the Commission felt that its interpretation of Congress' unexpressed intention required it to make. The District Court has pointed out the error which the Commission made in its interpretation of the statute (Record, pp. 91, 92). Even if the statute meant what the majority of

the Commission interpreted it to mean, however, the Commission's order is void because there was no evidence before the Commission to support its alleged conclusion of reasonableness. The statute expressly requires that the rates for scrip tickets be just and reasonable. Congress and the Commission knew the meaning of these words, and the Commission attempted to justify its action by meaninglessly reciting them.

The detailed findings of the Commission may be summarized as follows: The net railway operating income of the Class 1 roads was below the rate fixed by the Commission as a fair return. The operating ratio for freight service was lower than for passenger service (Record, p. 21). There is no analogy between interchangeable mileage or scrip tickets and the wholesale or carload-rate principle (Record, p. 26). The evidence tends to show that any benefit which the roads might receive from advance use of money paid for such tickets would be more than offset by the additional expense of accounting for and safeguarding them, which additional expense is estimated at approximately \$1,680,000 a year (Record, p. 27). The use of interchangeable mileage or scrip tickets sold at reduced rates would result in a reduction in fare on all transportation between points sufficiently distant from each other (Record, p. 27). It would produce, as estimated by the carriers, a decrease in passenger revenue amounting to 6% of the total, or approximately \$60,000,000 a year (Record, pp. 26, 39). "A scrip ticket at reduced fares could not be justified solely upon the theory that the cost per passenger-mile might thereby be reduced"

(Record, p. 27). "If carriers are to be required to issue a mileage or scrip coupon ticket at a reduced fare it must be mainly upon the assumption that travel will be stimulated thereby" (Record, p. 27).

These findings show the substance of the testimony before the Commission and its line of argument in reaching its so-called conclusion that the prescribed rates would be just and reasonable. The carriers are not earning as much money as they should. Passenger service is less remunerative than freight. The use of the tickets in question will increase the cost of passenger service and will decrease its revenue. There is therefore no justification for a reduced rate unless it can be found in the possibility that passenger travel will be so much increased by the reduction in rates as to more than offset the greater expenses and lesser revenues. On this point the Commission made the following findings:

"The evidence indicates that mileage tickets were primarily issued, not for the purpose of stimulating passenger travel but as a means of inducing shippers to route freight over particular railroads" (Record, p. 23).

"The record does not support the statement that the falling off in revenue passenger-miles during 1921 and the first six months of 1922 was due chiefly to the high level of passenger fares. This confirms what we said in *Reduced Rates 1922*, 68 I.C.C. 676, where we pointed out that the decrease in revenue passenger-miles in 1921 was the result of many contributing causes which in-

cluded business depression, the increased use of motor vehicles, the improvement of highways, and the high level of passenger fares. The passenger fare was undoubtedly a contributing cause, but it is contrary to the evidence to say it was the only or even the chief cause. The removal on January 1, 1922, of the war tax of 8 per cent. on passenger fares did not measurably stimulate passenger travel during the succeeding six months" (Record, p. 25).

"That some additional traffic would be created by a scrip ticket at reduced fares may fairly be assumed, although it is impossible to determine how much" (Record, p. 27).

"The question whether the mileage or scrip coupon ticket at reduced fare will stimulate travel sufficiently to increase or to equalize any loss in revenue that might result must remain in the realm of speculation until and unless such a ticket is established and experience recorded. The evidence neither proves the affirmative nor the negative of the question whether the mileage book used in the past stimulated travel and whether reductions in fares increased the number of revenue passenger-miles. The evidence as to the use of the mileage book is too indefinite to be helpful, or to afford a guide in determining for the future the question whether a scrip ticket at a reasonable fare below the standard fare would increase or decrease carriers' revenues" (Record, pp. 27, 28).

The Commission thus admitted that it did not have before it any evidence upon which to base a finding that passenger travel would be increased to any appreciable extent by a reduction in fare.

The Commercial Travelers' prophesies of an increase were more than offset by contrary prophesies by representatives of the carriers, especially as the latter were based upon actual experiences of the railroads in the past, when rate reductions failed to produce increased travel. This evidence, though meagre, was the only evidence of the sort available, and is the only real evidence on the subject in the record (see Record, pp. 107, 108, 110, 124).

The discussion of this point by the Commission amounts to this, that, if this ticket stimulates enough new travel, it will be a benefit to the railroads; otherwise it will be an injury.

The Commission suggests that a reduction tends to increase travel. But a general reduction of 20% on all fares would better increase travel, developing travel by the general public even more than by the professional travelers. If the appellants' argument has merit, such reduction would be better for the railroads. Nothing in the Commission's report, however, indicates that a general reduction would be just and reasonable.

We have summarized above the detailed findings of the Commission showing that they do not in any respect support its alleged conclusion. We would not be understood, however, as asserting that the mere absence of findings would be fatal to the order. The entire record before the Commission was introduced in this

proceeding and was before the District Court. In narrative form, as required by the equity rules, it is before this court. The detailed findings are supported by the evidence before the Commission. There is no other evidence in the record which by any stretch of the imagination can be said to contradict them or to support the alleged conclusion.

In the hope of aiding the court to locate the evidence contained in the record before the Commission, we have prepared a very brief subject index of that record, which is appended to this brief as Appendix F. This index gives references to all of the evidence before the Commission bearing upon the several important topics in the case, the references being arranged so as to show which evidence was supplied by the carriers and which by the Commercial Travelers.

As the District Court said (Record, p. 91):

“It is clear *from the record* (italics ours) that the Commission proceeded on the assumption that the spirit and theory of the congressional amendment required them to order the scrip coupons to be issued at reduced rates.”

And again:

“The furthest the Commission goes in its finding is to conclude that the record might justify the issuance of coupons at reasonably reduced rates for an experimental period; but there is nothing to indicate that the Commission, if it had felt free to exercise its own judgment, would have assumed the responsibility for establishing

the reduced rate, even for an experimental period" (Record, p. 92).

Our opponents have attempted to gloss over this lack of evidence by emphasizing certain optimistic guesses made by the Commercial Travelers. The argument of the Commission, for example, in its brief, at pages 11 and following, is to the effect that the Commission cannot be supposed to have made its order without being convinced that a sufficient increase in traffic would result from the reduced fares to more than make up the loss of revenue. The brief for the International Federation of Commercial Travelers Organizations attempts to be more specific in the matter. At pages 28 and 29 it quotes from the Commission's opinion those passages upon which it relies as showing that there was substantial evidence that traffic would be increased sufficiently to compensate the carriers for the loss in revenue. The very language quoted, however, shows the nature of the so-called "evidence" relied upon. The Commission states that the traveling men "urge" that the reduced-fare tickets "would stimulate travel" sufficiently to offset revenue decreases; that the use of such tickets "would in all probability" result in increased revenue; and that they "would" stimulate freight traffic (Record, p. 25). The report also refers to the recognized rule that decrease in price increases sales, to the fact that the carriers voluntarily sold mileage books at reductions prior to federal control, and that certain other forms of reduced rates create traffic. The Commission thereupon states that it "may

fairly be assumed" that "some" additional traffic would be created "although it is impossible to determine how much" (Record, p. 27). And finally, on the basis of all of this "evidence," which we must assume to be all that the Commercial Travelers were able to discover in the record, and which is all that can be found therein (see Appendix F), the Commission concludes "that the rates resulting from that reduction would be just and reasonable for this class of travel" (Record, p. 28).

These guesses do not even constitute that "mere scintilla of proof" which is always held to be insufficient as a basis for an administrative order. As this court said in *I.C.C. v. Union Pacific R.R. Co.*, 222 U.S. 541, at page 548, a decision of the Interstate Commerce Commission cannot "be supported by a mere scintilla of proof."

An order of the Commission fixing rates, if contrary to the evidence or unsupported by substantial evidence, is invalid.

A., C. & Y. Ry. v. United States, 261 U.S. 184.

I.C.C. v. Union Pacific R.R. Co., *supra*.
Florida East Coast R.R. v. United States, 234 U.S. 167.

The Commission, as the District Court has found, made this order under a mistaken view of the statute, believing that it required a reduction in rates regardless of the facts and regardless of their own judgment. The Commission acted "by way rather of fiat than of adjudication" (see *I.C.C. v. Northern Pacific Ry.*, 216 U.S. 538, 544).

B. The order is admittedly an experiment. Both the District Court and the Commission itself so interpret it (Record, pp. 91, 92, 27, 28).

The Commission has no authority to try experiments with the property of the railroads. Any such course of action is clearly outside of its powers and amounts to a deprivation of property without due process of law and a taking of private property for public use without just compensation.

If it be argued that any order establishing rates for the future is in a sense experimental, and that therefore this order is as justifiable as an ordinary rate order, we answer that no order can be upheld which is experimental in the sense that it is not based on evidence. A rate order is based upon past and present conditions combined with the best judgment of an expert body as to what those conditions will be in the future. But the best judgment of an expert body is a very different criterion from mere guesswork. In the order here involved, an expert body did not determine on the basis of its best judgment that the traffic would be sufficiently increased to increase net revenues. The Commission practically admit that the probabilities indicate exactly the opposite, and they expressly admit that they acted on the basis of what they consider a mandate from Congress. The order is therefore an experiment, which is based on mere speculation, for the purpose of finding out what conditions will be, rather than on any formed opinion as to what they will be.

In—

Rowland v. St. Louis & S.F. R.R. Co.,
244 U.S. 106—

this court, in an unanimous opinion, holding a rate confiscatory, used the following language (p. 110):

"It is objected that this does not allow for the increase of travel that would follow the reduction. The Railroad replies and the court below found that the increase is mainly at the expense of interstate revenue when the combined local rates are less than the interstate one. Whether this exhausts the matter or not we are of opinion that upon this record the supposed increase is too conjectural properly to affect our conclusion. The direct effect of the reduction is plain—the remote one is at best a guess."

The United States District Court in Missouri used the following language (*Kansas City Ry. Co. v. Barker*, 242 Fed. 310, 315):

"It must at least appear that the net aggregate return to the carrier is just, fair and reasonable; and this does not appear, to our satisfaction, from the statement of the Commission itself. . . . We think an actual test of the effect of these rates upon the business of complainant would be ineffective, because during the pendency of this litigation . . . there could be no appreciably increased settlement of the suburban districts affected."

See also *C., R.I. & P. Ry. Co. v. Ketchum*, 212 Fed. 986, 999.

It is argued that this court has recognized the desirability and propriety of making a test

of rates for a specified period to determine whether or not they will be confiscatory. The following cases are cited in support of this doctrine: *Knoxville Water Case*, 212 U.S. 1; *Willcox v. Cons. Gas Co.*, 212 U.S. 19.

We would point out that this is not the question here. First, even if such a test is permissible to determine whether or not rates will be confiscatory, it cannot be used, because it is not necessary, to determine whether they will be discriminatory. Second, the cases cited as the basis for this doctrine are readily distinguishable. In those cases the evidence indicated that the original rates were unreasonably high. No question of discrimination was involved, and the evidence pointed to a probability that the new rates would be compensatory. In the present case the original rates were not shown to be unreasonably high, but, on the other hand, were expressly shown to be those fixed by the Commission as the just and reasonable rates. The new rates were shown to be discriminatory, and the evidence indicated the probability that they would be non-compensatory.

The Commission in the former of these two situations has authority to remedy the existing unreasonably high rates, and it may do so in spite of the possibility that the new rates would be non-compensatory. In the present case the Commission has not the power to change the existing rates, because they have not been shown to be unreasonable and because it has been shown that the proposed new rates would in all probability be non-compensatory.

C. The result of this experiment, if permitted, would be to produce no better evidence as to the reasonableness of the rates in question than that which was available to the Commission at the time it made the order. The Commission requires the railroads and other interested parties to keep records of the use of its scrip-coupon tickets. The purpose of these records is of course to accumulate information with regard to the effect of the use of the tickets upon the amount of traffic and the net revenue of the carriers. This evidence, after it has been accumulated at great labor and expense and presented to the Commission, will indicate how many tickets of the sort prescribed were sold and how many persons bought them. It will not indicate how much farther those persons traveled than they would have traveled if they had not had such tickets. In order to determine this question a great mass of testimony will have to be taken from a very large number of individuals and organizations. Such testimony will be of no greater value than would the testimony of the same individuals and organizations at the present time with regard to whether, during the past year, they would have traveled more than they did if the tickets provided for in this order had been available. Testimony is no more valuable nor available which states how much the witness would have traveled if certain rates had been in effect than is testimony which states how much the witness would have traveled if such rates had not been in effect.

The only conceivable advantage that the Commission would have in accumulating evidence

after the experimental period would be that it would then know exactly how many users of these tickets there were and their names and addresses. Theoretically, therefore, the Commission could take testimony from every single individual who had used such tickets. Practically, of course, this procedure would be impossible. The Commission would have to limit its investigation to representative individuals, or in all probability to organizations of commercial travelers, hotel associations, and perhaps large shippers. Such organizations are not now unknown to the Commission. In fact they have been clamoring for special fares for years, and have been represented at all the hearings in this proceeding both before congressional committees and before the Commission itself.

If an experimental order is ever permissible (which we deny), it can only be upon the ground that it will produce evidence, otherwise unavailable, which will be more illuminating than any evidence obtainable without trying the experiment. This is not such a case.

D. The order is void because it imposes unreasonable burdens upon the railroads. As pointed out above, the Commission accepted the carriers' estimate that there would be approximately \$1,680,000 per annum of additional expense to Class 1 roads involved in the selling, accounting for, and safeguarding of these scrip tickets. This amount, as was testified by witness Rose (Record, pp. 110-116; and see "Rules and Regulations," Record, pp. 47-54), represents the wages of extra accounting and ticket-selling em-

ployees who will be required for the handling of these tickets. A very substantial burden of time and effort will be entailed in connection with the sale of the tickets on account of the requirements concerning photographs, signatures, etc. A large amount of time and labor will be involved in the various procedures where identification is necessary, as, for example, in the exchange of the coupons for the special form of ticket, the use of such ticket for checking baggage, and the presentation of such ticket on the train. There is great danger of misuse of the tickets, with resultant additional loss to the carriers, because of the large number of individual agents of the carriers who will be required to exercise their discretion with regard to the sufficiency of the identification. Passport photographs are notoriously unlike the originals, and there will surely arise frequent cases of disagreement between the holder of the ticket and the ticket agent, baggage agent, or conductor, thus causing loss of time, inconvenience, and probably loss of money to some or all of the parties. Further complications in the nature of litigation arising out of refusals to accept tickets or out of wrongful use of tickets will aggravate this condition (compare *Bitterman v. L. & N. R.R. Co.*, 207 U.S. 205).

We do not argue that the Commission cannot impose reasonable requirements to safeguard the non-transferability of tickets where such a course is necessary, nor do we advocate the sale of scrip-coupon tickets at a reduced price which are transferable. We wish to point out, however, that a very important element in the administra-

tion and use of the tickets prescribed in this order is the expense, inconvenience, and confusion that will surely result, and we emphasize this element as an additional indication of the unreasonableness of the order and the rate thereby imposed.

In this connection we call attention to paragraph 3 of section 22, imposing a very heavy fine upon any carrier which, through the act of any agent or employee, wilfully refuses to issue or accept these tickets or to conform to the rules made by the Commission. The fear of incurring this penalty will of course act as a deterrent in hundreds of cases where otherwise the agent of the carrier might suspect that tickets were being used contrary to the rules and regulations promulgated by the Commission. This will increase tremendously the burdens and dangers and loss just referred to.

E. The order is void because it prescribes non-compensatory rates. The Commission, as stated above, found that for the year 1921 the passenger operating ratio of Class 1 roads was 85.24 (Record, p. 21). This means that out of every dollar of passenger operating revenue 85.24 cents were spent to meet the cost of service.

The Commission's proposed order requires the carriers to perform exactly the same transportation service for holders of scrip tickets as for holders of standard tickets. Both will ride in the same trains and between the same stations, and both will have the same privileges. It is inconceivable that there should be any difference in the cost of the transportation service rendered (compare *Wis. R.R. Com. v. C., B. & Q.*, 257 U.S.

563, 588). There will, however, as pointed out above, be a difference in the cost of the administration of the tickets. The passenger operating expenses of the Class 1 roads will therefore be greater than before such tickets were issued.

This court has recently stated that a railroad is "entitled to just compensation, i.e., a reasonable return on the value of its property used in the public service, and unless contracted away, that right is protected by constitutional safeguards which may not be over-ridden by legislative enactments or considerations of public policy" (*Paducah v. Paducah Ry. Co.*, 261 U.S. 267, 272).

The carriers estimated that 30% of all passenger travel would be performed by holders of scrip tickets. This involves roughly \$300,000,000 of revenue. The 20% reduction amounts to \$60,000,000. The additional cost of administering these tickets is estimated to come to \$1,680,000 (Record, pp. 26, 27, 39). The mathematical result is plain. Out of operating revenues of \$300,000,000 the railroads in 1921 paid 85.24% for operating expenses of this traffic, or approximately \$255,720,000. Under the provisions of this order the cost of this traffic will be increased by \$1,680,000, making the total expenses \$257,400,000, while the revenues will be reduced by \$60,000,000 to \$240,000,000. The result indicates an operating ratio of 107.25% and an actual out-of-pocket loss to the carriers of \$17,400,000 on this line of traffic.

In the case of *N. & W. Ry. v. West Va.*, 236 U.S. 605, 613, 614, this court applied the doctrine referred to above, and did so by means of the operating ratio of the railroads, although

this method is objected to by certain of our opponents herein.

We have pointed out above (pp. 11-12) that for the latest available periods the passenger operating ratio for the Class 1 roads was 85.24% (Record, p. 21), and the average revenue per passenger mile (excluding commutation) was 3.481 cents (Record, p. 160, Exhibit 50, p. 1). This indicates an average cost per passenger mile of 2.97 cents. The increased cost to carriers for the handling and policing of these tickets and the increased expense involved in handling the increase of traffic (if any) produced by these tickets will still further add to the cost of performing the service. The revenue to be received by the carriers from the sale of these tickets is 2.88 cents per mile. Even without taking into account the additional expense, the cost of 2.97 is grievously in excess of the revenue of 2.88. Furthermore, the operating ratio under discussion does not include taxes, and if the appropriate proportion of railway taxes be added to this expense, the deficit will be still greater. It is obvious that the operating ratio for this traffic is very much greater than that which was held by this court in *N. & W. Ry. v. West Va.* to be non-compensatory.

A very serious error which permeates the reasoning of the brief for the Commercial Travelers above referred to is found at pages 35 to 38 thereof, in which they argue that the fares ordered by the Commission will be higher than the average fare paid on the remaining passenger business of the United States. This conclusion is based on assumptions rather than the figures contained in the record (see p. 160, Exhibit 50, p. 1). Further-

more, it concludes commutation service, and it ignores the additional cost to the carriers involved in the use of the proposed interchangeable tickets.

This court, in *Northern Pacific Ry. Co. v. North Dakota*, 236 U.S. 585, has expressly held that common carriers cannot be required to perform any particular part of their services at less than a compensatory return, even though the whole service is compensatory. The same doctrine was applied to passenger traffic in *Norfolk & W. Ry. v. West Virginia*, *supra*, 608, 609. If this be true of intrastate rates on coal in North Dakota, and of intrastate passenger fares in West Virginia, it must be equally true of rates on such an artificially selected class of passenger business as that involved in the use of these tickets.

F. The order is void because it discriminates between carriers. The statute permits the Commission to exempt certain carriers or parts of carriers from its requirements "where the particular circumstances shown to the Commission shall justify such exemption." Obviously, if this order were made effective upon one of two roads whose conditions were practically identical, it would amount to a discrimination against that road. One would be required to perform exactly the same service as the other, but would receive only 80% as much for it. If there were competition between these two roads, the road which was not required to issue these tickets would undoubtedly put them into effect if it found that competitive conditions were depriving it of traffic. Thus this road would be in a position to take

advantage of the situation either way, and would therefore receive an undue preference.

The only justification for requiring such tickets of some roads and exempting others would seem to be where the actual conditions upon the roads warranted the discrimination. As we shall show, however, in this case there was little or no evidence to support the Commission in the exemptions which it made. More than four hundred railroads were given blanket permission to take advantage of the order or not as they saw fit, and no reason for the discrimination was suggested except that some of these roads would not carry any traffic under these tickets or have any calls therefor if they were required to comply with the order (Record, p. 29). This reason appears to operate automatically to exempt the roads which fall within it, and therefore can hardly constitute a proper basis for the discrimination even as to roads which introduced evidence on the matter. Certainly it has no proper bearing upon those roads which did not introduce evidence and which do not fall within the reason.

The appellees are directly injured by this discrimination against them, and respectfully urge that such discrimination was not based upon evidence, and was arbitrary and unjustified.

G. The Commission acted beyond the scope of its authority and in an arbitrary manner in exempting from the effect of its order a very large number of carriers. The statute gives the Commission discretion to exempt from its provisions "either in whole or in part any carrier where the particular circumstances shown to the

Commission shall justify such exception to be made." There is no standard provided in the statute to guide the Commission's discretion in this respect. This in itself, as we point out below (pp. 119-121), is a delegation of legislative authority to the Commission which transcends the bounds of proper delegation of such power.

It is obvious from the language of the statute just quoted above that Congress contemplated an order applying to all the railroads in the country with the exception of those few roads or branches which for some special reason should be exempted. There was clearly no contemplation of a blanket exemption, leaving out of the scope of the order more than twice as many railroads as were included within it. It is true, as noted in some of the opposing briefs, that the roads exempted are for the most part small roads or switching companies. But they are nevertheless individual entities and in many cases vitally important as common carriers. Moreover, their financial responsibility is usually less, the smaller they are (*cf.* Record, pp. 155, 156).

The power to exempt contemplates the making of a general order from which certain individuals are excepted for reasons which affirmatively justify such exceptions. It does not permit the blanket exclusion of a large class of individuals without such affirmative justification. This court has recently held that a saving clause in an order of the Commission permitting exceptions from its terms upon proper showing cannot validate an order "affecting all rates of a general description when it is clear that this would include many rates not within the proper class or

the reason of the order" (*Wisconsin R.R. Com v. C., B. & Q. R.R. Co.*, 257 U.S. 563, 580).

The order therefore goes beyond the power of the Commission under the Act.

The bill as passed by the Senate contained no provision for any exemptions. The Committee on Interstate and Foreign Commerce of the House of Representatives reported the bill to the House with various amendments, including one to insert the sentence providing for exemptions.

The report of Mr. Winslow, Chairman of the Committee, refers to this amendment as one of the two principal changes proposed by the Committee. His report describes it as "the provision for the exemption of certain rail carriers in case the Interstate Commerce Commission shall see fit to authorize the issuance of a mileage more or less general but not universal, as applied to all rail carriers" (67 Cong. 2d Session, House of Representatives, Report No. 1096).

On June 29, 1922, Mr. Winslow, in speaking of this proposed amendment and in reply to a question as to its meaning and purpose, said (Congressional Record, 67th Congress, Second Session, p. 10,461):

"The theory is this, that the scale of prices for carrying a passenger a mile vary now under the regulations of the Interstate Commerce Commission from 3.6 cents per mile, as a minimum, up to 5 cents or 6 cents a mile, and above, I think, in some instances. Now, it might be, if the commission saw fit to get out a mileage book, that they could get out one covering the great majority of the railroads of the country at 3.6 cents per mile, but other

railroads could not afford to carry passengers at that price. So, in order to get out a mileage book, in case they saw fit to order the issue of one, we provided that they could indicate the roads upon which the general mileage rate would be acceptable, profitable. As some other roads could not carry at the same rate per mile, we realized there should be a right for the commission to make exemptions. Hence this provision."

The amendment was thereupon adopted. This is the only reference to this amendment in the debates in the House. Clearly it refers to a mileage ticket in contradistinction to a scrip-coupon ticket. The suggested contingency could not arise in connection with scrip tickets, which are equivalent to money rather than to miles of transportation. There is nothing in either the language or the history of the clause in question to justify the Commission in a blanket exclusion of several hundred roads under the guise of "exemption."

An equally serious defect is to be found in the method which the Commission adopted in making this blanket exemption. The Commission's report (Record, p. 29) states that more than four hundred carriers filed applications for exemption, but that comparatively few of them introduced any evidence. The principal reasons assigned for exemption by short lines, electric roads, and switching and terminal carriers were that they were engaged chiefly in intrastate commerce, or that they handled a negligible amount of passenger traffic, or that they did not honor or sell passenger tickets to and from points on other

lines, or that they had no passenger service, or that there would be no demand from them for interchangeable scrip or mileage tickets. The Commission does not even limit its blanket exemption to carriers whose circumstances fall within these reasons. It proceeds, with practically no evidence before it, to find "that the particular circumstances shown to us warrant the exemption of all carriers by rail which are not included in Appendix C" (Record, p. 29). (See the remarks of Commissioner Hall in his dissenting opinion at pages 30 and 31 of the Record.)

This action was of course arbitrary and invalid, because without evidence. To make it worse, the Commission proceeds to provide that, if any carrier so exempted should thereafter decide to establish and use the scrip-coupon tickets provided for in the order, "our finding of exemption will not preclude them from doing so" (Record, p. 29). An admission of lack of substantial evidence!

In other words, the Commission gave to several hundred carriers the right to determine for themselves whether or not they should be subject to this order, and it did this practically without evidence and wholly contrary to the evident intent of the statute in permitting exemption. This action, as we have pointed out above, discriminates against the carriers which are not exempted; it is arbitrary and without the power of the Commission, and it amounts to a delegation of legislative power to carriers by the Commission, contrary to section 1, article 1, of the Constitution.

H. The Commission's action is invalid because it includes intrastate commerce. The order expressly provides that these interchangeable tickets shall be good on all passenger trains of all non-exempted carriers (Record, p. 55). They are not limited to use in interstate travel. As a practical matter it would be very difficult to impose such limitation, and would add greatly to the confusion and expense of the administration of these tickets. Such practical considerations, however, cannot enlarge the jurisdiction of the Commission. Neither Congress nor the Commission can prescribe intrastate rates. The order is therefore void in so far as it purports to do so.

Any passenger who uses one of the proposed interchangeable tickets for transportation between two points within a state would be traveling in intrastate commerce (see *Southern Pacific Co. v. Arizona*, 249 U.S. 472). The language of the order obviously permits such use of the tickets. The courts cannot save a statute or an order of the Commission by interpreting the language to include only that which the courts or the Commission had authority to include unless the language requires, or is sufficiently ambiguous to permit, such interpretation. Where, as here, the language is not ambiguous, it must stand or fall on the basis of its ordinary meaning (see *Employers' Liability Cases*, 207 U.S. 463, 500, 501).

The legislative history of this provision of the statute shows that, as the bill originally passed the Senate, it read:

"A just and reasonable rate per mile good

for interstate passenger carriage upon the passenger trains," etc.

The House Committee introduced an amendment to strike out the word "interstate," and this amendment, after a very brief debate, was carried (see Appendix B, pp. 140, 154).

The argument of the supporters of the House Committee amendment was that, as the Commission had jurisdiction only over interstate carriers, it could not act under this amendatory statute outside of that jurisdiction, but that, if the tickets were confined strictly to interstate travel, they would be of comparatively little use to the commercial travelers. The remarks of Senator Pomerene quoted in Appendix B concisely state that the House Committee amendment would introduce a constitutional difficulty. This amendment was accepted by the Senate nevertheless, and is embodied in the bill as enacted.

In this connection we call attention to the significant difference between the language of the statute and the language of the Commission's order. The statute provides for tickets "good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act." The Commission's order provides for tickets good "for the carriage of passengers on *all* passenger trains operated by said respondents" (italics ours—Record, p. 55). The "said respondents" included "all carriers by rail subject to the interstate commerce act" (Record, p. 18).

The Commission has, as Senator Pomerene foresaw (see Appendix B, p. 157), issued an order "making it applicable to intrastate business as well as to interstate business."

It may be argued that the recent decision of this court in *Railroad Commission of Wisconsin v. C., B. & Q. R.R.*, 257 U.S. 563, has upheld the action of Congress in extending the power of the Commission over intrastate rates. To this argument there is a conclusive answer. The *Wisconsin* case upheld an order of the Commission forbidding the state commission to require lower rates on intrastate traffic than those prescribed by the Commission for all traffic. The order of the Interstate Commerce Commission, however, which fixed a general rate level applying to intrastate traffic as well as interstate traffic was a special sort of order based upon two particular provisions of the Interstate Commerce Act as amended by the Transportation Act of 1920. These provisions were section 15a, requiring rates to be fixed so as to produce a fair return upon railway property, and section 13, paragraph 4, forbidding discrimination against interstate commerce. The circumstances of the *Wisconsin* case led the court to decide that, where the Commission had increased rates under section 15a by a general rate order applying to all traffic throughout the country, the state commission could not, by reducing certain rates, cut down the total revenue to be received by the carriers, thus imposing a discriminatory burden upon interstate commerce.

The *Wisconsin* case does not give to Congress or the Interstate Commerce Commission jurisdiction to fix intrastate rates in general. It is limited to cases of general rate orders for the purpose of establishing a basis for a fair return under section 15a. There is no such question

involved in this order, nor is there any attempt by any state to discriminate against interstate commerce such as gave rise to the Interstate Commerce Commission's right to act in the *Wisconsin* case.

Therefore the action of the Commission exceeded the scope of its authority, and the order is illegal and void because it invades the jurisdiction of the states.

III.

THE ORDER IS VOID BECAUSE IN MAKING IT THE COMMISSION VIOLATED SECTION 15a OF THE INTERSTATE COMMERCE ACT.

Section 15a of the Interstate Commerce Act, which was added to the statute by the Transportation Act of 1920, requires that the Commission, in the exercise of its power to prescribe just and reasonable rates—

“shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to the fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: provided, that the Commission shall have reasonable latitude to modify or adjust any

particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country."

Pursuant to this section, the Commission in *Increased Rates, 1920 (supra)* divided the railroads of the country into four groups—the Eastern, the Southern, the Western, and the Mountain Pacific—and fixed the tentative valuation of the Eastern Group at \$8,800,000,000. In *Reduced Rates, 1922 (supra)* it fixed the rate of return at 5.75%, and reaffirmed the valuation previously established, plus the net cost of additions and betterments made by the carriers since the time of fixing such valuation.

Under the rates and fares prescribed by the Commission and in effect at the time the investigation herein was made and the order in suit issued, the carriers in the Eastern group were not earning 5.75%, but were in fact earning only 3.78% on their tentative valuation (Record, p. 69). The Commission's order, as appeared from the record before it, involved a reduction in revenue of approximately \$60,000,000 per annum for the railroads of the country, or approximately 6% of their total passenger revenue (Record, pp. 26, 39). The passenger revenues of the Eastern group for the year 1922 were approximately \$540,000,000 (Record, p. 71). Six per cent of this is over \$32,000,000, which represents the loss in net railway operating income which would be caused to the appellees by the enforcement of the Commission's order.

The Commission, therefore, in making this order required the carriers to establish rates

which would substantially reduce their net railway operating income at a time when their income was not sufficient to enable them to earn the rate of return required by section 15a of the Act. Section 22 directs the Commission to require the issuance of mileage or scrip tickets at just and reasonable rates. Section 15a requires it to fix rates which will enable the carriers to earn the return therein provided for. The Commission, therefore, in making this order violated the mandate imposed upon it by section 15a.

As this court has pointed out in the *Wisconsin* case, *supra*, at pages 582 to 588, the amendments to the Interstate Commerce Act incorporated therein by the Transportation Act, and particularly section 15a, which was called "the most novel and most important feature of the Act" (p. 584), have established a new federal policy, which has, as its main purpose, the providing of adequate transportation facilities for the people of the whole country. This ultimate purpose is to be effectuated by securing, in the first instance, adequate revenues for the carriers. It cannot be disputed that the carriers have not been earning, and are not earning, the return which, under the specific mandate of Congress, they should have, not only in their own interest, but in the interest of the people (Record, p. 21); and it must be obvious that, if the Interstate Commerce Commission can reduce revenues, as it proposed to do in this case, in total disregard of the provisions of section 15a, it can defeat the central purpose that Congress had in mind in passing this legislation.

In making this contention we do not suggest

that the amendment under which the Commission has acted in this case is inferior to the provisions of section 15a. We only claim that this amendment should be read in harmony with section 15a. As we have pointed out above, all parts of the Commerce Act must be read together. This court has noted "the dove-tail relation" between section 13 and section 15a (257 U.S. 586). Certainly there must be a similar relation between section 22 and section 15a, especially where the mandate to the Commission under both of these sections is to establish "just and reasonable rates."

The issue in the *Wisconsin* case involved a conflict of jurisdiction between the state and the federal governments. This court held that, in spite of the fact that the Commission's order therein involved cut into the jurisdiction of the state, it was nevertheless valid under the provisions of section 15a and paragraphs 3 and 4 of section 13. The new policy adopted by Congress in section 15a made it necessary for the federal authorities to infringe upon the state's jurisdiction to whatever extent might be required to safeguard the income of the national transportation system as provided for in section 15a.

In the instant case there is no conflict of jurisdiction between federal and state governments. The Interstate Commerce Commission itself has acted in such a way as to endanger the success of Congress' policy of a fair return for all of the railroads. The constitutionality of that policy has been expressly upheld and its importance emphasized by this court. If the jurisdiction of the states, which under our system must be

safeguarded by this court, was not a sufficient reason for permitting an obstruction of that policy in the *Wisconsin* case, certainly the desire of special interests for a special rate cannot here be allowed to work such an obstruction.

It cannot be said that the order here in question falls within the proviso of section 15a above quoted. That proviso confers upon the Commission power to meet the specific conditions relating to "any particular rate" or to different sections of the country. It cannot be construed to extend to a general reduction in the rates for a large class of travelers, which reduction would apply without reference to local conditions or to any individual rate.

IV.

THE COMMISSION ERRED IN THINKING THAT "THIS AMENDMENT CONTEMPLATES THAT CARRIERS SHALL BE REQUIRED TO RECOGNIZE AN ADDITIONAL CLASS OF PASSENGER TRAVEL AND TO PROVIDE A SPECIAL FORM OF TICKET WHICH SHALL BE ISSUED AT JUST AND REASONABLE RATES FIXED BY US TO COVER SUCH TRAVEL" (RECORD, PP. 22, 23).

The original form of the bills contemplated making commercial travelers an additional class of passenger travel, but such an idea was definitely rejected by Congress before enactment. All that we have said above with respect to the principles which forbid inserting by implication a provision definitely rejected by Congress applies to the interpretation placed by the Commission upon the amendment. The reasons which exist for reduced rates for commutation, excursion, and tourist fares and which have been well

understood and defined by the Commission apply in no sense to the purchasers of interchangeable tickets. The latter *do not* constitute a defined class who can be transported at less than the standard cost, and therefore are in no way entitled to any special rate.

Commutation, convention, excursion, and tourist fares are clearly distinguishable from the form of ticket here ordered.

"In commutation fares both distance and time are determining factors" (Record, p. 22).

"The convention fare is designed to take care of the movement of passengers within a limited time for a special purpose" (Record, p. 22).

Guaranties of a minimum number of persons to be carried are frequently required by carriers as a condition for granting the special fare (Record, p. 22). The excursion fare represents an intensified movement of passengers between particular points on particular days within a defined period (Record, p. 22). Tourist fares apply between resorts at definite seasonal periods (Record, p. 22).

The attempt to assimilate the new ticket to any of the above forms on the assumption that its users will constitute a new class within the reason existing for issuance of the tickets named is wholly fallacious. Each of the foregoing special classes has specific characteristics which distinguish it from passenger travel generally, and enable the carriers to perform the transportation in volume and at a reduced cost.

We quote from Commissioner Daniels (Record, pp. 34 *et seq.*) :

“Commutation fares are based on the fact that many city workers live in relatively near-by suburban districts, journey daily to and from work, and make no demand for baggage service. The carrier can therefore with comparative certainty calculate in advance upon a steady, heavy, and daily volume of travel. This permits affording a rate of fare, lawfully open to all purchasers, but as a matter of fact utilized almost exclusively by a particular class. It is hedged about by the requirement of being used within the month for which the ticket is commonly valid. Its use is confined to stretches of line not unduly long. Parallel suburban electric lines often afford a competitive service which would render the discontinuance of ~~commutation~~ fares by steam roads practically impossible. This constant, heavy, and daily volume of travel over short stretches of line differentiates this kind of service from passenger service generally.

“The convention and excursion fares are characterized, not merely by the lower rate per mile, but by the virtually predictable volume of traffic which these fares evoke. They permit preparation in advance for accommodating a more or less certainly ascertainable number of passengers whose journeys will fall within designated periods. While such fares undoubtedly stimulate travel because they offer a temporary abatement of the going rate, they are feasible

only under conditions which afford the carriers full opportunity in advance to cope with the exceptional temporary volume of travel. It seems clear that a special excursion fare, good for three days, let us say, to Niagara Falls, will afford extra trainloads of passengers. But were this fare permanently to supplant the standard fare to the same destination, it is clear that the extra volume of travel would not be continuous, and that, even if it were, the carrier could not ordinarily render the physical service continuously without impairment of other services which it is bound to afford. For example, a special excursion fare on a holiday may serve to fill coaches which would otherwise stand idle. But the temporary surplus of equipment ceases with the resumption of the ordinary tide of daily travel. The characteristic feature of convention and excursion travel may be found in the time limitations attached and the opportunity such time limitations afford to the carrier to provide the special accommodation necessary.

“The tourist fares and tourist travel are unlike the types previously described in that they are generally seasonal and afford a longer period within which the tourist may elect to travel. It may be said, however, that the travel to which they apply is normally long-distance travel. This, of itself, delimits somewhat sharply the extent to which this service will be demanded. Pullman service is likely to be required by the tourist, and this relieves the carrier by rail-

road to a degree of certain burdens which the exclusive use of ordinary coaches would entail. The reservation of Pullman service by the tourist may also serve as something of advance notice of the time when such tickets must be honored. Furthermore, seasonal forecasts based on past experience allow some considerable knowledge in advance of the probable extent of tourist travel. In other words, the extent to which empty space on through trains for long trips is capable of being partly filled by the offer of tourist rates of fare is also characteristic of this traffic.

“The above-described classes of passenger travel then have fairly well-defined and special characteristics. Commutation service is unique in its large volume, its regularity, and in the delimited area within which it is demanded and supplied. The extra service involved in excursion and convention travel is capable of close calculation in advance, both as to the revenue it is likely to yield and as to the extent to which special physical provision must be made therefor. Tourist travel is seasonal, is generally for long distances, and is also capable of fairly accurate prevision.”

The courts and the Commission have long recognized the differences between these various types of special fares and interchangeable mileage or scrip tickets. In particular they have emphasized at great length the very fundamental distinction between commutation rates, where suburbs of a city have grown up in reliance on

them, and all other classes of passenger fares.

The Commission has now actually required the carriers to submit statistics showing their commutation business separately from other passenger traffic. Commutation service is now recognized as a distinct branch of the railroads' transportation business. (See order of Interstate Commerce Commission issued December 31, 1920, requiring the carriers to use Form OS-D in reporting certain statistics. Items 6-01, 7-01, and 8-01 call for number of commutation passengers carried, number of commutation passenger miles (by thousands), and commutation revenue, respectively. Items 6-02, 7-02, and 8-02 call for similar information for all other passengers. See the last column on page 1 of Exhibit 50 herein, Record, p. 160.)

The so-called "additional class of passenger travel" which the Commission felt itself required to provide for in making the order in controversy does not bear any distinguishing characteristics which would warrant its separation from other sorts of passenger travel.

The holders of such tickets may travel at any time, in any direction, on any trains, between any points. There is no predictable season, route, or train in or upon which such tickets may be expected. No preparation can be made for their accommodation. The holders will not move daily in regular volume between known points, as do commuters. Nor between points named in advance at seasons or upon holidays when equipment can be spared from other service, as may be for excursions. Nor between resorts established by custom and availed of by a calculable tide of travel, as does the tourist. The coupon-

ticket holder may enjoy limited trains or way trains, excess-charge trains or ordinary trains. He may, and probably usually will, carry baggage. No human foresight can so provide as to effect any economies from any increased travel stimulated by the sale of the ticket.

If the loss in revenue to the appellees herein from the reduced fare ordered by the Commission is \$32,000,000 (see *supra*, p. 62), then at 2.88 cents per mile, the selling price of the proposed ticket, the carriers must perform well over one billion additional passenger miles of service to earn enough revenue merely to make up this loss. These figures represent only the appellees here, and do not show the number of additional passenger miles which must be performed by all of the Class 1 railways throughout the country to offset the losses which they would sustain under the order, nor do they take any account of the additional cost which must necessarily be incurred by the carriers in rendering this large amount of extra service.

The figure of one billion passenger miles, even if we limit ourselves to that figure, conveys little impression to the average mind. Expressed in another way, this figure means that if the average journey of a ticket holder is 50 miles (Exhibit 50 gives 51½ miles as the average journey for passengers other than commuters) 20,000,000 such journeys must be made which would not otherwise be made before the total figure of additional service is reached. Or, expressed in another way, 100,000 persons must make 200 additional journeys of 50 miles each within a year.

These computations give some indication of the

tremendous amount of additional traffic which would be necessary merely to make up the loss to the appellees herein for the actual reduction in fare. They do not allow for the loss of any of the other roads, or for the additional cost of performing this extra service, or of issuing and policing the scrip-coupon tickets.

That this extra travel will result from the tickets to be issued under the order is expressly found by the Commission to be "in the realm of speculation" (Record, p. 28).

As we pointed out above, before the additional traffic, if any, produced by the reduced rate can begin to recompense the carriers for the loss in revenue, it will be necessary that users of the tickets travel 25% more than they would otherwise do for a given expenditure. The additional expense involved in this increase of 25% will then have to be taken care of before the carriers can begin to feel any net increase in revenue.

The brief filed in this court on behalf of the International Federation of Commercial Travelers Organizations as *amicus curiae* attempts, at pages 117 ff., to dispose of this difficulty. It is there suggested that one additional passenger per car over the figures for the first six months of 1922 would more than make up the loss in revenue of all the carriers in the United States. One extra passenger per car does not sound like a very large increase—which seems to be the implication from this argument. Considering, however, that the average number of passengers per car for 1922 was 15, it means an increase of one fifteenth, or approximately 7% of the carriers' total passenger business; or, translated into passenger miles, it means an in-

crease of 2,198,000,000, as appears at page 118 of that brief—over twice the amount on which we based our computations regarding the number of additional journeys.

The brief intimates that the commercial travelers would unobtrusively be absorbed into the present traffic, one passenger to a car without expense, when it suggests that it would be a benefit, instead of an expense to increase the average from 15 to 16 per car. But obviously they will crowd the commercial routes instead of distributing themselves with academic regard for railroad economy, one commercial traveler to a car throughout the country.

If the argument is made that as a general principle a reduced rate would stimulate travel, it does not follow that it would stimulate travel only, or any more, among those who have \$72 in their pockets than among the general public. In fact the former in general would be less likely to be affected by rate changes than those who figure their expenses in cents rather than dollars. It cannot be doubted that a general reduction in passenger rates would stimulate travel on the part of the less well-to-do in much greater degree than on the part of professional traveling men and wealthy pleasure seekers. There should be nothing in the possession of \$72 which should constitute a class to be set aside and selected for this favor which is denied to the man or woman with only \$1. The Commission itself finds that the wholesale principle in the mercantile world involves elements entirely lacking in this new ticket (Record, p. 26). There is no analogy between this ticket and the carload rate (Record, p.

26). The carriers cannot perform the service for coupon-ticket holders on a wholesale basis. The average ride is only about 50 miles. There will be a large number of coupon-ticket riders for short distances, and they will be scattered all over the United States and will not be bunched either as to time, place, route, or train.

In other words, the order requires a wholesale rate to be given for a retail service to a certain selected class, which class is selected merely and solely because they have more money to spare than the general public.

There is no gain to the carrier from having a large amount of transportation bought at one time and getting the use of the money for a short period. The Commission finds that not only is the evidence of this supposed advantage inconclusive, but it is more than offset by the additional expense of accounting and policing the use of the ticket (Record, p. 27).

It was suggested that the commercial travelers form a separate classification of passengers on the ground that their activities tend to create additional freight traffic (Record, p. 25). Apparently this argument did not appeal strongly to the Commission, inasmuch as no reliance is placed upon it as a basis for the Commission's so-called conclusion. If, however, the possible stimulation of freight traffic were found to be a justification for special rates for commercial travelers it would nevertheless fail to justify the classification made in the Commission's proposed order. That order prescribes tickets which may be used by any one, commercial traveler, stimulator of freight or not, who has enough

money to purchase the tickets and who travels far enough in a year to make such purchase worth while.

The order is not an order regulating the rate for a ticket already in use and issued by the carriers of their own volition, for the Commission finds:

“Carriers have never issued an interchangeable mileage ticket good for use on all railroads in all parts of the country. Mileage tickets were issued good for use over particular lines and were interchangeable as to carriers within defined territories” (Record, p. 24).

“The evidence neither proves the affirmative nor the negative of the question whether the mileage book used in the past stimulated travel and whether reductions in fares increased the number of revenue passenger-miles” (Record, p. 28).

“The evidence as to the use of the mileage books is too indefinite to be helpful, or to afford a guide in determining for the future the question whether a scrip ticket at a reasonable fare below the standard fare would increase or decrease carriers’ revenues” (Record, p. 28).

The brief of the Interstate Commerce Commission suggests, at pages 17 and 18, that the prior existence of interchangeable scrip-coupon tickets issued at the standard rate negatives the argument that the tickets prescribed in the order create a new classification of traffic. This argument completely misses the point. The new clas-

sification is not merely a classification of persons who travel on interchangeable scrip-coupon tickets. It is rather one of persons who have \$72 to invest in transportation in advance. There is no similarity whatsoever between the present transferable interchangeable scrip-coupon tickets sold for \$15, \$30, or \$90 at the option of the purchaser, and the suggested tickets sold only at \$72 and non-transferable.

There can be but one justification for a reduced rate, and that is a reduced cost. Yet every legitimate inference from the record leads to a conclusion of higher, not lower, cost.

There is no finding by the Commission that a greatly added volume of passenger traffic can be handled with the present equipment of the carriers. On the contrary, it is notorious that equipment is taxed to the limit. The carriers have been so starved for earnings and so adversely affected by strikes that it is common knowledge that equipment is below normal.

There can therefore be no reduction in cost per passenger because of handling a greater volume of traffic. More traffic means more equipment, more power, more cars, more cost.

V.

IN THE RESPECT THAT THE COMMISSION'S ORDER IS AN ARBITRARY AND UNREASONABLE DISCRIMINATION IN FARES BETWEEN SCRIP-COUPON PASSENGERS AND REGULAR-FARE PASSENGERS, IT IS BEYOND THE POWER OF THE COMMISSION AND LACKS DUE PROCESS OF LAW.

It is elementary that the body charged with administering in detail a valid statute may act in

such an arbitrary or unfair manner that the statute through its enforcement may take property without due process of law.

Yick Wo v. Hopkins, 118 U.S. 356:

The administration of a municipal ordinance to regulate the carrying on of a lawful business violates the Fourteenth Amendment if it makes arbitrary and unjust discriminations founded on differences of race between persons otherwise in similar circumstances.

In—

Tarrance v. Florida, 188 U.S. 519,
520—

the law of the state was not challenged, but its administration was complained of. Brewer, J.:

“Such an actual discrimination is as potential in creating a denial of equality of rights as a discrimination made by law.”

Dobbins v. Los Angeles, 195 U.S. 223,
240 (Day, J.):

“This court, in the case of *Yick Wo v. Hopkins*, 118 U.S. 356, held that although an ordinance might be lawful upon its face and apparently fair in its terms, yet if it was enforced in such a manner as to work a discrimination against a part of the community for no lawful reason, such exercise of power would be invalidated by the courts.”

The Commerce Act requires the Commission to adopt just and reasonable rates after a hearing. It requires these rates under sections 2 and

3 to be free from unjust discrimination and undue and unreasonable preference. It places upon the Commission the duty of establishing rates so that the carriers will earn a fair return upon the value of their property (section 15a). It requires the Commission to act upon evidence, and not by guess.

The Commission's order reducing the rate 20% for coupon tickets results in taking the railroads' property without due process of law, because it creates an arbitrary classification of passengers into those who have the desire and the money to buy 2500 miles in advance and those who have not.

If this classification were made by charging less for the coupon tickets and increasing the rate on regular tickets correspondingly, it is possible that the railroads, not being harmed, could not raise this point. The general public, who have no occasion for 2500 miles of transportation at a time or no money to buy so much, would then be the parties whose property would be taken without due process of law. It is not consistent with due process of law under the Fifth Amendment to deny any party the equal protection of the laws guaranteed against state action by the Fourteenth Amendment.

Fuller, C.J., in *Giozza v. Tiernan*, 148 U.S. 657, 662:

"And due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government."

Harlan, J., in *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 559; quoting Fuller, C.J., in *Duncan v. Missouri*, 152 U.S. 377, 382:

“Due process of law and the equal protection of the laws are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of Government.”

But as the regular fare, under this order, remains the same, and the scrip-coupon fare is reduced 20%, both the railroads and the general public are hurt—the railroads because they are required to cut their rates, affecting largely people who would travel anyway, on a substantial proportion of their passengers; the general public because, if the railroads can stand a cut in rates, the cut should operate equally on all who use the same service.

The mileage book or scrip-coupon ticket differs essentially from the commutation or excursion ticket.

A group of persons desiring to take a particular journey at a particular time may fairly be classified separately from the general public. So also may all persons “commuting” regularly between the same points.

But it is no reasonable ground for giving a lower rate or other preference to one man that he can afford to pay a substantial sum in advance. This classification is bad because it has no reasonable relation to the subject-matter, which is travel. The man who wants to pay a large sum in advance and travel often uses the

service just like any other traveler. To give him a 20% discount is just as arbitrary as to give the discount to every tenth applicant at the ticket office.

The decision of the Supreme Court in *Interstate Commerce Commission v. Baltimore & Ohio Railroad*, *supra*, does not conflict with the principle for which we are contending. That case arose out of a contest which was really a contest between two railroads. The Baltimore & Ohio had for some years been issuing ten-party tickets. Complaint was made by the Pittsburgh, Cincinnati & St. Louis Railroad to the Commission to have such party tickets cancelled, obviously the effort of a competitor to prevent the use of a competitive rate. The court assumed (and this assumption is the justification for the decision) that parties of ten could undoubtedly be carried at lower cost to the carrier than individuals riding on one-way tickets, and held that the sale of such ten-party tickets did not violate the prohibitions of the Commerce Act. The case was decided in 1892 upon a state of facts existing in 1890, only three years after the original Interstate Commerce Act was passed and when the agitation against discrimination had not risen to the height which caused the enactment of the Elkins and Hepburn Acts and produced the most stringent regulations of the Commerce Act against discrimination in every form.

The court in its opinion suggested that the enumerated exemptions in the first paragraph of section 22 were illustrative, and not exclusive. It is to be observed that the provisions of the first paragraph of section 22 are for the benefit

of the carrier and to allow it a reasonable latitude in the establishment of rates of fare when bearing a proper relation to cost of service or possible reduction of expense per passenger mile.

Nothing in the *Baltimore & Ohio* case militates against the principle that the carrier may voluntarily establish rates based upon the sound principle above mentioned if they are not discriminatory, which it could not be *compelled* to put into effect by either the legislature or the Commission. The doctrine of the *Baltimore & Ohio* case cannot be carried further than that, in addition to the exemptions mentioned in the first paragraph of section 22, the carrier may be *permitted* to establish reasonable differences in rates where the class of travel favored has a well-established relation to the cost of handling. It certainly cannot be carried to the extent of either permitting the carrier or authorizing the Commission to establish arbitrary classes of travel at favored rates without respect to cost of handling. Unless this distinction and limitation is carefully observed, the prohibitions against discrimination in the earlier sections of the Act would be rendered innocuous and ineffectual.

We are confirmed in this view because by later decisions it has become well settled, first, that an arbitrary and unjust discrimination is not permitted simply because it results in greater profit to the carrier, and second, that a discrimination is arbitrary and unjust if it bears no relation to the subject-matter of the regulation.

In—

Atchison & Santa Fé Ry. Co. v. Vosburg, 238 U.S. 56, 60, 61—

a statute giving attorneys' fees to shippers, but not to railroads, in suits between them, without reference to which party, whether the railroad or the shipper, was plaintiff, was held void because arbitrary, having no relation to the subject-matter, namely, to secure adequate prosecution in court of actions respecting car service. Compare this case with the numerous cases holding in suits against railroads that the defendants may be required to pay the plaintiffs' attorneys' fees. See *Kansas City Southern Ry. Co. v. Anderson*, 233 U.S. 325.

In—

Cotting v. Kansas City Stock Yards Co., 183 U.S. 79—

the state argued (p. 103) that it was proper to classify stockyards on the basis of business done because rates may be made lower in a plant where the volume of business is large, while in a smaller plant higher rates may be necessary in order to afford adequate returns; but the court held unanimously that this classification was void. Brewer, J. (p. 104):

“Clearly the classification is based solely on the amount of business done and without any reference to the character or value of the services rendered. Kindred legislation would be found in a statute like this: requiring a railroad company hauling ten tons or over of freight a day to charge only a certain sum per ton, leaving to other railroad companies hauling a less amount of freight the right to make any reasonable charge; or, one requiring a railroad com-

pany hauling a hundred or more passengers a day to charge only a specified amount per mile for each, leaving those hauling ninety-nine or less to make any charge which would be reasonable for the service; or (if we may indulge in the supposition that the legislature has a right to interfere with the freedom of private contracts), one which would forbid a dealer in shoes and selling more than ten pairs a day from charging more than a certain price per pair, leaving the others selling a less number to charge that which they deemed reasonable; or, forbidding farmers selling more than ten bushels of wheat to charge above a specified sum per bushel, leaving to those selling a less amount the privilege of charging and collecting whatever they and the buyers may see fit to agree upon. In short, we come back to the thought that the classification is one not based upon the character or value of the services rendered but simply on the amount of the business which the party does, and upon the theory that although he makes a charge which everybody else in the same business makes, and which is perfectly reasonable so far as the value of the services rendered to the individuals seeking them is concerned, yet if by the aggregation of business he is enabled to make large profits his charges may be cut down. . . .

“This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based

upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

See also *Gulf, C. & S.F. Ry. Co. v. Ellis*, 165 U.S. 150, 155.

Southern Ry. Co. v. Greene, 216 U.S. 400, 417 (Day, J.):

"While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

Selling mileage transportation, which costs the same *per capita* as ordinary transportation, at a cheaper rate *per capita*, is indefensible in theory, because the basis of the discrimination is not the service rendered but the capacity of the traveler to buy. The opinion of the Commission would justify a life-insurance company in selling a \$100,000 life policy at a much cheaper rate per thousand than a \$1000 policy, the other elements being the same, because it is a large sale and may be

made very profitable for the company through reducing the expenses per thousand and stimulating the purchase of large policies. Yet it is universally conceded that such a practice would violate the anti-discrimination laws.

In—

Providence Coal Cases, 1 I.C.C. 107—

the Commission ruled that lower rates to wholesale shippers violated the Commerce Act.

In—

Matter of Passenger Tariffs, 2 I.C.C. 649—

a decision of the Interstate Commerce Commission prior to the *Baltimore & Ohio Railroad* case, the Commission expressed the opinion that party rates lower than the regular rates for single passengers were an illegal discrimination.

The principle of the mileage book or scrip-coupon ticket at a lower rate has been condemned as an arbitrary and unjust discrimination in the following decisions:

In re Mileage Books, 28 I.C.C. 318, 323:

“If it were not for the provision of Section 22 of the Act to regulate commerce, that nothing in the Act shall prevent the issuance of mileage tickets, it is debatable whether the concession from the regular fare made to the purchasers of mileage books would be lawful. While that question is foreclosed by the provision in Section 22, the very fact that the mileage book owes its existence to

a special permission of the statute is significant. *Escher vs. P. R. R. Co.*, 18 I. C. C. 60."

Proposed Increases in New England,
49 I.C.C. 421, 444:

"The fundamental evil in the sale of mileage books, at least in New England, is that they accord preferential fares to those who use them. In northern New England, for example, a man with sufficient capital to buy a mileage book, may ride 100 miles for \$2.25. A less fortunate individual riding between the same points in the same train and on the same car, must pay \$3 for the same service. Witness after witness testifying for the carriers, when asked upon what theory such discrimination could be justified, replied that it could not be justified on any principle. It is clear that the mileage book evil in New England must be eliminated, either by canceling the mileage fares entirely or by increasing them more nearly to the basis of regular one-way tickets. If travelers want mileage tickets as a convenience and not as a discrimination, there is no great objection to permitting their sale."

The leading case is—

Lake Shore & Michigan Southern Ry.
Co. v. Smith, 173 U.S. 684:

A Michigan statute required that each railroad company in the state should sell one thousand-mile tickets at a price not exceeding \$20

in the Lower Peninsula and \$25 in the Upper Peninsula; that such tickets might be non-transferable, but whenever required by the purchaser they must be issued in the names of the purchaser, his wife, and children; and that each ticket should be valid for two years only after date of purchase. The court held (Chief Justice Fuller, Gray, J., and McKenna, J., dissenting) that the statute was void as a taking of property without due process of law. Peckham, J. (p. 690):

“The question is presented in this case whether the legislature of a State, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, with the limitations above stated, and having power to alter, amend or repeal their charters, within certain limitations, has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law.

“It is said that the power to create this exception is included in the greater power to fix rates generally; that having the right to establish maximum rates, it therefore has power to lower those rates in certain cases and in favor of certain individuals, while maintaining them or permitting them to be maintained at a higher rate in all other

cases. It is asserted also that this is only a proper and reasonable regulation.

“It does not seem to us that this claim is well founded. We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to and obeying the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire and are able to purchase tickets at what might be called wholesale rates—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. . . .

“The power of the legislature to enact

general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not reasonable regulation. We do not deny the right of the legislature to make all proper rules and regulations for the general conduct of the affairs of the company, relating to the running of trains, the keeping of ticket offices open and providing for the proper accommodation of the public. . . .

“If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if

enforced, take the property of the company without due process of law? We are convinced that the legislature cannot thus interfere with the conduct of the affairs of corporations.

“But it may be said that as the legislature would have the power to reduce the maximum charges for all, to the same rate at which it provides for the purchase of the thousand-mile ticket, the company cannot be harmed or its property taken without due process of law when the legislature only reduces the rates in favor of a few instead of in favor of all. It does not appear that the legislature would have any right to make such an alteration. To do so might involve a reduction of rates to a point insufficient for the earning of the amount of remuneration to which a company is legally entitled under the decisions of this court. In that case reduction would be illegal. For the purpose of upholding this discriminatory legislation we are not to assume that the exercise of the power of the legislature to make in this instance a reduction of rates as to all would be legal, and therefore a partial reduction must be also legal. *Prima facie*, the maximum rates as fixed by the legislature are reasonable. This of course applies to rates actually fixed by that body.

“There is no presumption, however, that certain named rates which it is said the legislature might fix but which it has not, would, in case it did so fix them, be reasonable and valid. That it has not so fixed

them affords a presumption that they would be invalid, and that presumption would remain until the legislature actually enacted the reduction. At any rate, there is no foundation for a presumption of validity in case it did so enact, in order to base the argument that a ~~partial~~ reduction, by means of this discrimination, is therefore also valid. And this argument also loses sight of the distinction we made above between the two cases of a general establishment of maximum rates and the enactment of discriminatory, exceptional and partial legislation upon the subject of the sale of tickets to individuals willing and able to purchase a quantity at any one time. The latter is not an exercise of the power to establish maximum rates. . . .

“The legislature having fixed a maximum rate at what must be presumed, *prima facie*, to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike, that no discrimination against it in favor of certain classes of married men or families, excursionists or others, shall be made by the legislature. If otherwise, then the company is compelled at the caprice or whim of the legislature to make such exceptions as it may think proper and to carry the excepted persons at less than the usual and legal rates, and thus to part in their favor with its property without that compensation to which it is entitled from all others, and

therefore to part with its property without due process of law. . . .

“It is no answer to the objection to this legislation to say that the company has voluntarily sold thousand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company. . . .

“In this case there is not an exercise of the power to fix maximum rates. There is not the exercise of the acknowledged power to legislate so as to prevent extortion or unreasonable or illegal exactions. The fixing of the maximum rate does that. It is a pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road and permitting them to do so at a less expense than others, provided they buy a certain number of tickets at one time. It is not

legislation for the safety, health or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who in the legislative judgment should be carried at a less expense than the other members of the community. There is no reasonable ground upon which the legislation can be rested unless the simple decision of the legislature should be held to constitute such reason."

In—

Beardsley v. N.Y., L.E. & W. R.R.,
162 N.Y. 230—

a state law was held unconstitutional, on the authority of the *Smith* case, requiring each railroad to issue a mileage book entitling the holder to travel one thousand miles on its own lines.

In—

Commonwealth v. Atlantic Coast Line R.R., 106 Va. 61; 55 S.E. 572—

the court made a similar decision.

A similar case, following the above three cases and relying upon them, is—

State v. Great Northern Ry., 17 N.D. 370; 116 N.W. 89.

In—

State v. Bonneval (La.), 55 So. 569—

the validity of a state statute providing that all members of a family should be entitled to the benefit of a mileage ticket as though each were the original purchaser was questioned. The maximum rate of fare was 3 cents. The railroad had

for many years, however, issued mileage books at the reduced price of 2½ cents, making the book non-transferable. The court held, on the authority of the *Smith* case, that the legislature could not order the issuance of mileage tickets or prescribe who should be the beneficiaries thereof, and hence the statute was invalid.

The following cases, which distinguish the *Smith* case on their particular facts, without exception recognize the soundness of its doctrine:

*Railroad Commissioners of Ga. v. L.
& N. R.R. Co. (Ga.), 80 S.E. 327:*

In this case the Georgia Railroad Commissioners ordered the railroads selling mileage or scrip books to tear off the coupons upon the trains instead of requiring the coupons to be exchanged for tickets. The railroad brought suit to enjoin the order on the ground that the issuance of the tickets at less than the maximum rates of fare could not be compelled, and that therefore the railroad had a right to make a contract as to the terms under which the tickets could be used. The court held that it was settled that, where a state had fixed a reasonable maximum rate, it could not compel railroads to sell mileage tickets at a less rate, and further that, where a railroad had voluntarily issued tickets of this character, the decision in the *Smith* case did not go to the length of denying the state the power to regulate the manner of using such tickets.

*State v. Maine Central R.R. Co., 77
N.H. 425:*

In this case the New Hampshire law requiring the sale of mileage books at 2 cents per mile was

held valid. The *Smith* case was held not to be applicable, because it was not alleged in the New Hampshire case that the legislature had fixed any maximum rate which should be considered as just and reasonable. The only question raised was as to the sufficiency of the fare, it being contended that the statute was confiscatory. The case is not against our position. The statute did not discriminate. It provided an intrastate mileage book at 2 cents per mile, that being the only intrastate rate fixed in New Hampshire. So in the instant case, if the Commission had ordered these tickets issued at the standard rate, the carriers would not have this cause of complaint.

Purdy v. Erie R.R. Co., 162 N.Y. 42:

This case, which arose about the same time as the case of *Beardsley v. N.Y., L.E. & W.* (*supra*), held that, as applied to a railroad chartered after the passage of the New York statute requiring the issuance of mileage tickets, the statute was constitutional and operative, inasmuch as the corporation must be taken to have accepted its charter on the condition that such tickets might be required of it. After differentiating the *Beardsley* case and recognizing the force of the *Smith* case, the court said:

"We know of no reason, however, why a railroad company may not agree, upon sufficient consideration, to surrender or transfer any specific pecuniary right" (p. 48).

Horton v. Erie R.R. Co., 72 N.Y.S. 1018:

This case expressly follows the *Purdy* case, upholding the constitutionality of the New York

statute "in so far as it relates to railroad corporations thereafter incorporated in this State."

Minor v. Erie R.R. Co., 171 N.Y. 566:

This case, which was exactly like both the *Purdy* and *Horton* cases, was decided on the same ground.

Duluth St. Ry. Co. v. Ry. Com. of Wis.,
152 N.W. 887, 894, 895:

In this case the court upheld the State Commission in requiring that the street-railway company issue six tickets for 25 cents, the single fare being 5 cents. The court expressly recognized the doctrine of the *Smith* case, and differentiated it on two grounds, the first being that it was carrying the doctrine of discrimination to a ridiculous limit to say that any discrimination was involved in requiring persons who desired to purchase only a single ride to pay 5 cents while others, who were able and willing to invest 25 cents, received six rides therefor. In other words, "*de minimis non curat lex.*" (So much of this case as deals with this point is referred to in the brief for the International Federation of Commercial Travelers Organizations at page 67. That brief, however, does not mention the court's second point.) The court then proceeds:

"There is another and perhaps a better reason why the doctrine of the case above cited [*Smith* case] does not apply. The smallest fractional currency we have is one cent. A reduction in the rate of fare from 5 cents to 4 cents amounts to 20 per cent and is a large reduction. It is not the law that a railroad commission, or the legislature for

that matter, cannot reduce a rate of fare from 5 cents unless it reduces it to 4, 3, 2, or 1 cent. Here the Commission evidently determined that a charge of $4\frac{1}{6}$ cents per passenger was as low as the rate should go. There is no way that such a rate could be put into effect without requiring the passenger to buy at least six tickets. Everyone has a like privilege. The amount of investment here required in the first instance is too small to constitute a discrimination, and in the next place it is necessary that a bunch of tickets be sold, such as was here determined upon, in order to fix what is really a reasonable rate of fare."

The above are all the cases that we have been able, after exhaustive research, to discover which deal directly with mileage or scrip-coupon tickets. Counsel for the International Federation of Commercial Travelers Organizations, in their brief filed as *amicus curiae*, refer to no others. There are, however, several important cases which, while they do not deal with mileage tickets, bear directly upon the point at issue and involve the same principles as those applied in the cases just cited. These cases will be discussed at this point:

Chicago, R.I. & P. Ry. Co. v. Ketchum,
212 Fed. 986:

This was a bill in equity by the railroad against the Iowa Railroad Commissioners to restrain an order compelling the railroads to grant excursion rates to all persons traveling to the City of Des Moines during the continuance of the State Fair. The District Court, three judges sitting,

held that the rates fixed by the general statute are presumably just and reasonable, and that the legislature, having prescribed such rates, had no power to make exceptions thereto in favor of a particular class of passengers or a particular locality. Conceding that the state might compel the railroads to grant excursion rates to persons attending the State Fair on the ground that it is an educational institution, the compulsory extension of such rates to all passengers for Des Moines during the continuance of the Fair was unconstitutional as an arbitrary discrimination depriving the railroads of their property without due process of law. The court considered at length the subject of commutation, party, mileage, and excursion tickets. After discussing the *Smith* case the court said (pp. 998-999):

“We find nothing in the later decisions of the Supreme Court which indicates a purpose to dissent from the principles therein announced. It must therefore be accepted by us as settled that the legislature cannot enact a law making maximum rates and then proceed to make exceptions to it in favor of such persons as the legislative judgment may deem proper. . . . When maximum rates have been declared they are presumed to be reasonable and the legislature is presumed to have fixed such rates upon a reasonable basis after due investigation and consideration. It may not then depart from them in sporadic instances. It may not tell the company to charge smaller rates for conventions, church or political, or for other excursions, at least unless it be strictly limited to those attending the meeting

which is deemed educational. The power when exercised must affect directly, peculiarly and exclusively the public interest which may properly be promoted. . . .

“We recognize the rule that a temporary injunction against the enforcement of an act of the state Legislature fixing rates is seldom granted until after a trial of the rates if there is a bona fide resistance made by the state and there exists any doubt whatever as to the facts, but the question here involved is much broader than that embraced in such cases. Here it is not a question of whether the particular rate will be confiscatory or not. There is no conceivable chance of profit to the railroad company which would make this law valid. The court could not be further enlightened by additional disclosures of material evidence. On the other hand, the injury flowing from the unwarranted order would be accomplished and irreparable.”

In—

Northern Pacific Ry. Co. v. North Dakota, 236 U.S. 585—

involving the intrastate rates on coal in carload lots fixed by the statute of North Dakota, the Supreme Court held that the state has no right to segregate a commodity or a class of traffic and compel the carrier to transport it at a loss or without substantial compensation. These rates, fixed by the statute, were held unreasonable, requiring the carrier to transport the commodity either at a loss or for a merely nominal compensation, after taking into account the entire traffic

to which the rates applied, and therefore deprived the railroads of due process of law. Hughes, J. (p. 595):

“As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain. Thus, in *Lake Shore & Michigan Southern Ry. v. Smith*, 173 U. S. 684, the regulation as to the sale of mileage books was condemned as arbitrary without regard to the total income of the carrier. Similarly, in *Missouri Pacific Ry. v. Nebraska*, 217 U. S. 196, it was held that the carrier could not be required to build mere private connections, and the adequacy of the receipts from its entire business did not enter into the question. And this was so because the obligation was not involved in the carrier’s public duty and the requirement went beyond the reasonable exercise of the State’s protective power. . . .

“The State cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing

the burden of the upkeep of the property upon coal and other commodities. . . .

“The State insists that the enactment of the statute may be justified as ‘a declaration of public policy’. In substance, the argument is that the rate was imposed to aid in the development of a local industry and thus to confer a benefit upon the people of the State. The importance to the community of its deposits of lignite coal, the infancy of the industry, and the advantages to be gained by increasing the consumption of this coal and making the community less dependent upon fuel supplies imported into the State, are emphasized. But, while local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the State may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier’s undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed. It does not aid the argument to urge that the State may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others

might be served at a rate unreasonably low. That would be but arbitrary action. We cannot reach the conclusion that the rate in question is to be supported upon the ground of public policy if, upon the facts found, it should be deemed to be less than reasonable. The legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business. . . .

“But a different question arises when the State has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted. . . . It has repeatedly been assumed in the decisions of this court, that the State has no arbitrary power over the carrier’s rates and may not select a particular commodity or class of traffic for carriage without reasonable reward.”

Justice Hughes, after discussing *Atlantic Coast Line R.R. v. North Carolina Corporation Commission*, 206 U.S. 1, involving the validity of an order requiring the railroad company so to arrange its schedule of transportation between two points as to make connections with through trains, quoted from that decision as follows (pp. 602-603):

"Let it be conceded that if a scheme of maximum rates was imposed by state authority, as a whole adequately remunerative, and yet that some of such rates were so unequal as to exceed the flexible limit of judgment which belongs to the power to fix rates, that is, transcended the limits of just classification and amounted to the creation of favored class or classes whom the carrier was compelled to serve at a loss, to the detriment of other class or classes upon whom the burden of such loss would fall, that such legislation would be so inherently unreasonable as to constitute a violation of the due process and equal protection clauses of the Fourteenth Amendment. Let it also be conceded that a like repugnancy to the Constitution of the United States would arise from an order made in the exercise of the power to fix a rate when the result of the enforcement of such order would be to compel a carrier to serve for a wholly inadequate compensation a class or classes selected for legislative favor even if, considering rates as a whole, a reasonable return from the operation of its road might be received by the carrier. Neither of these concessions, however, can control the case in hand, since it does not directly involve any question whatever of the power to fix rates and the constitutional limitations controlling the exercise of that power, but is concerned solely with an order directing a carrier to furnish a facility which it is a part of its general duty to furnish for the public convenience."

Resuming the opinion of the court in *Northern Pacific Ry. v. North Dakota*, Justice Hughes said (p. 604):

“To repeat and conclude: It is presumed,—but the presumption is a rebuttable one—that the rates which the State fixes for intrastate traffic are reasonable and just. When the question is as to the profitableness of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business and show that it has been denied a fair return upon that value. With respect to particular rates, it is recognized that there is a wide field of legislative discretion, permitting variety and classification, and hence the mere details of what appears to be a reasonable scheme of rates, or a tariff or schedule affording substantial compensation, are not subject to judicial review. But this legislative power cannot be regarded as being without limit. The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it

must be concluded that the State has exceeded its authority."

Northern Pac. Ry. Co. v. North Dakota, 236 U.S. 585, is affirmed in—

Vandalia R.R. v. Schnull, 255 U.S. 113, 119, 120—

particularly the language:

"that the State has no arbitrary power over the carrier's rates and may not select a particular commodity or class of traffic for carriage without reasonable reward."

This principle was applied to passenger traffic in—

Norfolk & W. Ry. v. West Virginia, 236 U.S. 605, 608, 609—

holding that no department of the carrier's business could be selected by the State Commission for arbitrary control.

In—

Chicago, Milwaukee & St. Paul R.R. v. Wisconsin, 238 U.S. 491—

a Wisconsin statute prohibiting the railroad from letting down an upper berth not taken when the lower berth was occupied was held unconstitutional, reversing the state court, which upheld the statute on the ground that it contributed to the comfort and convenience of the traveling public and incidentally to their health and general welfare. The Supreme Court held (McKenna, J., and Holmes, J., dissenting) that the state cannot compel the railroad to give the occupant of the

lower berth the free use of the upper berth while it is not actually purchased by another passenger. The opinion cites the *Smith* case upon the point that (p. 499)—

“keeping the upper closed will not add to the comfort of the public generally.”

The ground upon which the statute was bad was that it discriminated in favor of the passenger who happened to have no passenger above him, giving him twice the space for the same money.

In—

*Wisconsin, Minnesota & Pacific R.R.
Co. v. Jacobson*, 179 U.S. 287—

an order enforcing track connections was sustained. The court said that the distinction between this case and the *Smith* case is plain. Peckham, J. (p. 301) :

“There we held that the statute in question was not a reasonable regulation of the business of the company; that it was the exercise of a pure, bald and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road, permitting them to do so at a less expense than others, provided they could buy a certain number of tickets at one time. It was not legislation for the safety, health or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of who in the legislative judgment should be carried at a less expense than the other members of the community, and there was no reasonable ground upon which the legislation

could be rested, unless the simple decision of the legislature should be held to constitute such reason."

In—

Commonwealth v. Interstate Street Ry., 187 Mass. 436—

involving the validity of a statute requiring school children to be carried for half fare, the question was whether there is constitutional justification for discriminating between pupils of the public schools and other persons. The court said (Knowlton, C.J., p. 438):

"If this were an absolute and arbitrary selection of a class independently of good reasons for making a distinction, the provision would be unconstitutional and void. . . . The subject of compelling a railroad company to make an exception as to its rates in favor of a certain class of persons was considered elaborately in *Lake Shore & Michigan Southern Railway v. Smith*, 173 U. S. 684, and it was held that ordinarily the legislature has not power to compel such action. The subject is also referred to in *Wisconsin, Minnesota & Pacific Railroad v. Jacobson*, 179 U. S. 287, 301. . . .

"If therefore it plainly appeared that the enforcement of this section would cause expense to street railway corporations which they must bear themselves or put upon other classes of passengers in the form of increased fares to make good the loss from carrying school children at half rates, we should be obliged to hold that there was a taking of

property without due process of law through unconstitutional discrimination."

The decision was that, since the selection of the favored class was not arbitrary, but was in aid of the education of children, a subject for legislation which has occupied the law-makers from early times, and which is within the police power of the state, and since the evidence offered by the defendant had no tendency to show that it would suffer loss by carrying these pupils at half rates, the statute was valid.

"We hesitate to say that our law-makers could not pass the act as one which would put no financial burden upon anybody" (p. 440).

Upon writ of error the Supreme Court of the United States affirmed the decision upon grounds which indicate that an order compelling the issuance of mileage books at a reduced rate would have been held void.

Interstate Ry. Co. v. Massachusetts,
207 U.S. 79:

A majority of the court considered that the case was disposed of by the fact that the statute was in force when the street railway took its charter, and confined itself to that ground. Holmes, J., writing the opinion and speaking for himself alone, observed that the position of the majority was sufficiently doubtful to make it unsafe not to discuss the validity of the regulation apart from the supposition that the street railway had accepted it. Page 86:

"The objection that seems to me, as it

seemed to the court below, most serious is that the statute unjustifiably appropriates the property of the plaintiff in error. It is hard to say that street railway companies are not subjected to a loss. The conventional fare of five cents presumably is not more than a reasonable fare, and it is at least questionable whether street railway companies would be permitted to increase it on the ground of this burden. It is assumed by the statute in question that the ordinary fare may be charged for these children or some of them when not going to or from school. Whatever the fare, the statute fairly construed means that children going to or from school must be carried for half the sum that would be reasonable compensation for their carriage, if we looked only to the business aspect of the question. Moreover, while it may be true that in some cases rates or fares may be reduced to an unprofitable point in view of the business as a whole or upon special considerations, *Minneapolis & St. Louis R.R. Co. v. Minnesota*, 186 U. S. 256, 267, it is not enough to justify a general law like this, that the companies concerned still may be able to make a profit from other sources, for all that appears. *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 24, 25.

“Notwithstanding the foregoing considerations I hesitatingly agree with the state court that the requirement may be justified under what commonly is called the police power.

...

“Education is one of the purposes for which what is called the police power may be exercised. *Barbier v. Connolly*, 113 U. S. 27, 31. Massachusetts always has recognized it as one of the first objects of public care. It does not follow that it would be equally in accord with the conceptions at the base of our constitutional law to confer equal favors upon doctors, or workingmen, or *people who could afford to buy 1000-mile tickets*” (*italics ours*).

In—

Pennsylvania R.R. Co. v. Towers, 245
U.S. 6—

the order of the state commission fixing reasonable rates for commutation tickets was upheld in view of the distinction between commutation tickets and mileage tickets. As we have above shown, commutation tickets do not operate as an arbitrary classification, because the distinction is based upon a reasonable distinction in the service (see pp. 33, 70, *infra*). The railroad, however, attempted to bring the case within the *Smith* case. The court properly distinguished the *Smith* case on the ground (p. 10)—

“that a maximum rate for passengers having been established, that rate was to be regarded as the reasonable compensation for the service and that the fixing of the less rate to particular individuals was an arbitrary exercise of legislative power and an unconstitutional interference with the business of the carrier, the effect of which was to violate the provisions of the 14th Amendment to the Federal Constitution by depriving the rail-

road company of its property without due process of law and denying to it the equal protection of the law. The *Lake Shore* case did not involve as does the present one the power of a State Commission to fix intrastate rates for commutation tickets where such rates had already been put in force by the railroad company of its own volition, and we confine ourselves to the precise question presented in this case which involves the supervision of commutation rates when rates of that character have been voluntarily established by the carrier. . . .

“That the State may fix maximum rates governing one-way passenger travel is conceded. Having the general authority to fix rates of a reasonable nature, we can see no good reason for denying to the State the power to exercise this authority in such manner as to fix rates for special services different from those charged for the general service. In our opinion the rate for a single fare for passengers generally may be varied so as to fit the particular and different service which involves, as do commutation rates, the disposition of tickets *to passengers who have a peculiar relation to the service* [italics ours]. The service rendered in selling a ticket for one continuous trip is quite different from that involved in disposing of commutation tickets where a single ticket may cover 100 rides or more within a limited period. The labor and cost of making such tickets as well as the cost of selling them is less than is involved in making and selling

single tickets for single journeys to one-way passengers.

“The service rendered the commuter, carrying little baggage and riding many times on a single ticket for short distances, is of a special character and differs from that given the single-way passenger.”

The distinction between commutation tickets and mileage tickets is further emphasized by the Supreme Court, quoting from the opinion of the Interstate Commerce Commission in the—

Commutation Rate Case, 21 I.C.C.
428:

“Nor need we stop to point out the distinction between commutation tickets on the one hand and excursion and mileage tickets on the other. Compared with the normal one-way fare all such tickets may be said to be abnormal. But the resemblance stops at that point. Although they are mentioned together in section 22, the force and effect of that provision must necessarily differ with the differing character of the several kinds of tickets. It seems to be settled under that section that a carrier may enter upon the policy and practice of issuing mileage books and excursion tickets at less than its regular normal fare for the one way journey, and, having adopted such a policy, may subsequently withdraw from it and refuse longer to issue such tickets. That has been the view of this Commission, and is the view generally entertained, although there may be exceptional circumstances where a dif-

ferent conclusion would be required. It by no means follows, however, that a carrier under Section 22 may exercise the same scope and freedom of action with respect to commutation tickets."

This case, *Pennsylvania R.R. Co. v. Towers*, does not shake the authority of the *Smith* case except in the following respect (p. 17):

"The views therein expressed which are inconsistent with the right of the states to fix reasonable *commutation* fares when the carrier has itself established fares for such service, must be regarded as overruled by the decision in this case." (Italics ours.)

It should be noted that even as to the right of the Pennsylvania Commission to require the continuance of commutation rates Chief Justice White, McKenna, J., and McReynolds, J., dissented.

In—

Arkadelphia Co. v. St. Louis S.W. Ry. Co., 249 U.S. 134—

after bills in equity to restrain freight rates had been dismissed, reversing the court below, which had granted injunctions, the cases were sent to a master for the purpose of determining the damages against the railroads sustained by the granting of the injunctions. The questions dealt with refunds of overcharges. The railroads excepted to an allowance in favor of the Arkadelphia Company on the ground that the "rough material rates were discriminatory against shippers who did not reship the specified percent-

ages of the finished product." The rough material rates were a part of a general schedule that covered a wide field. This schedule was established in the exercise of the legislative authority of the state, and could not be set aside by the court on the ground of discrimination unless it amounted to a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. The court said (p. 149):

"But there is nothing to show that the rough material rates wrought any discrimination against the railway companies. They were applicable upon all railways alike. If there was—not in the least intimating that there was—undue discrimination as against small shippers or those who had no occasion to obtain transportation for the manufactured product over the line of the same carrier, this was not a matter of which the railways could complain. It is most thoroughly established that before one may be heard to strike down state legislation upon the ground of its repugnancy to the Federal Constitution he must bring himself within the class affected by the unconstitutional feature. . . .

"*Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684, did not set aside this established principle. The discrimination in favor of certain patrons, there referred to, was laid hold of rather as showing the unreasonable character of the regulation. The authority of that case is not to be extended."

The *Arkadelphia* case is no authority against our contention. When the entire schedule of rates had been sustained as not confiscatory, and hence not denying the railroads due process of law, of course a railroad could not raise the point that a particular class of shippers was discriminated against and was denied the equal protection of the laws. That is a question which the shipper who was hurt must raise.

To make the case at bar parallel with the *Arkadelphia* case we would first have to have a decision that the whole schedule of passenger rates, including the interchangeable mileage rates, is valid; in brief, that what the railroad loses on the mileage rates it makes up on other fares. If that were once decided, the people who were hurt by reducing the rate to commercial travelers and increasing it to ministers of religion, for example, would have to raise the point. But when the carriers themselves are harmed by an arbitrary classification which reduces the fares for the commercial travelers while not raising them against other members of the public, this result, as held in the *Smith* case, deprives the carriers of due process of law.

We emphasize again the language last above quoted from the *Arkadelphia* case, referring to the *Smith* case: "The discrimination in favor of certain patrons, there referred to, was laid hold of rather as showing the unreasonable character of the regulation." In other words, the railroad in the *Smith* case was not permitted to show discrimination against individuals for the purpose of withholding relief by way of damages from

those individuals, but rather in order to show that the rates, being discriminatory, were unreasonable, and therefore could not be forced upon the railroad. It is not the law that a railroad can charge, or be compelled to charge, unreasonable or discriminatory rates *until* or *unless* some one who is injured thereby complains. The statute prohibits unreasonable or discriminatory rates, and therefore neither the railroads nor the Commission is at liberty to put them into effect. In particular, the Commission has no power to require unlawful rates to be charged by the railroads. This point is so obvious as scarcely to need the citation of authority. We refer again briefly, however, to the *Tennessee* case (*Nashville &c. R.R. v. Tennessee*, 262 U.S. 318), in which this court said, at page 323:

“A lower rate may result in giving to a single quarry within the State all of the governmental business, so that competing quarries and localities within or without the State, or interstate traffic, would be prejudiced. That such undue discrimination does, and will, result from the order of the Tennessee Commission was expressly found by the Interstate Commerce Commission.”

It is to be noted that it was the railroads, and not the quarries “within or without the State” of Tennessee, which complained to the Interstate Commerce Commission of the Tennessee Commission’s order. Furthermore, the point under discussion was expressly called to the attention of this court by counsel for the Tennessee Commission, who, in their brief before this court on a motion for supersedeas, at page 16, stated that—

"The persons and localities injuriously affected were not the complainants in the proceeding before the Interstate Commerce Commission in which the order was made. . . . Statutory authority for a proceeding before the Interstate Commerce Commission at the complaint of carriers concerned, resulting in an order removing a discriminatory rate because injuriously affecting persons other than the carriers who instituted the proceedings, is wholly foreign to the principles of a court of equity, which confines its processes to relief of complainants injuriously affected by the subject matter against which the process of the court is invoked."

In *New York v. United States*, 257 U.S. 591, the court, at pp. 599 and 600, discussed the question of whether the Commission's order under attack was based upon sufficient evidence of discrimination against persons and localities. The railroads had applied to the Interstate Commerce Commission for an order directing them to put intrastate passenger (and certain other) fares on the same level as interstate fares. They had introduced evidence showing, *inter alia*, discrimination against passengers in interstate travel. But no such passengers had joined in the complaint (*Rates, Fares and Charges of New York Central Railroad Co.*, 59 I.C.C. 290, 302). The Commission had granted their petition. This court found that the evidence of discrimination against persons or localities was not sufficient to sustain the order, but upheld it on the ground of discrimination against interstate commerce as such. But the fact that the court considered the matter of

discrimination against persons not complainants indicates that the railroads were not precluded from raising the question (see also *Wis. Ry. Com. v. C., B. & Q. R.R. Co.*, 257 U.S. 563, 579, 580).

We call attention to sections 13 and 15 of the Interstate Commerce Act. The first of these sections provides for complaints before the Commission, either brought by parties interested or by the Commission on its own motion.

“And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant” (24 Stat. L. 379).

Section 15 gives the Commission power, upon any complaint made as provided in section 13, or after investigation and hearing on its own initiative, to fix rates for the future wherever it decides that there is a violation of the provisions of the Act prohibiting unjust, unreasonable, unjustly discriminatory or unduly preferential or prejudicial rates, etc.

The Commission is also authorized by the Act to award damages to an individual complainant who is injured by any violation of the Act. In such a case obviously the complainant cannot be awarded damages unless he can show himself

to have been injured. Even in a reparations case, however, the Commission is empowered to correct the violation of the Act, not merely for the benefit of the actual complainant, but for the benefit of every one else who has been or may be injured, whether or not a party to the proceeding. As this court has said in—

Texas & Pacific Ry. v. Abilene Co.,
204 U.S. 426, 446:

“When the Commission is called upon on the complaint of an individual to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complainant alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all.”

See also *Phillips v. Grand Trunk Ry.*,
236 U.S. 662, 665, 666.

VI.

THE STATUTE IS UNCONSTITUTIONAL BECAUSE IT DELEGATES LEGISLATIVE POWER TO THE COMMISSION WITHOUT FIXING ANY STANDARD TO GUIDE THE COMMISSION'S ACTION.

The statute permits the Commission to exempt carriers in whole or in part “where the particular circumstances shown to the Commission shall justify such exemption to be made.” There is no word in the statute to furnish to the Commission any rule or guide to indicate to them under what conditions and circumstances the

power to exempt shall be exercised. The Supreme Court has often said that, where legislative power is delegated to an administrative tribunal, there must be standards provided to guide the action of the tribunal. In—

Wichita R. & L. Co. v. Public Utility Commission of Kansas, 260 U.S. 48—

the court said (p. 59):

“In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function.”

In—

Yick Wo v. Hopkins, 118 U.S. 356—

the Supreme Court held invalid a city ordinance which did not provide any standard under which an administrative officer should determine applications for licenses to carry on business. The court, on page 368, stated that the ordinance divided owners of wooden laundries into two classes—

“not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure.”

This ordinance is expressly differentiated from one where discretion is given to a public officer to grant licenses on the basis of the fitness of applicants. In other words, such power cannot be exercised by an administrative official or body unless the statute granting the power prescribes a standard for its exercise.

The amendment of August 18, 1922, does not prescribe such a standard. Therefore it is an unconstitutional delegation of legislative power.

We respectfully submit that the lower court was right in permanently enjoining the enforcement of the order, and that its decree should be affirmed.

Respectfully submitted,
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APPENDIX A.

BILLS INTRODUCED INTO CONGRESS PROVIDING
FOR INTERCHANGEABLE TICKETS AT REDUCED RATES:

67th Congress, 1st Session.

S. 331.

In the Senate of the United States.

April 12, 1921.

Mr. McKellar introduced the following bill;
which was read twice and referred to the
Committee on Interstate Commerce.

A bill authorizing and directing the Interstate
Commerce Commission to establish a system
of mileage books to be issued to commercial
travelers at a reduced rate by all railroad
companies carrying passengers.

*Be it enacted by the Senate and House of
Representatives of the United States of America
in Congress assembled, That the Interstate Com-
merce Commission be, and it is hereby, author-
ized, directed, and empowered to fix and establish
on all passenger-carrying railroads a system of
mileage books for the use of commercial trav-
elers on all passenger-carrying railroads at a
rate of 20 per centum less than the regular
passenger-fare rates already fixed.*

67th Congress, 1st Session.

S. 819.

In the Senate of the United States.

April 13 (calendar day, April 15), 1921.

Mr. McKellar introduced the following bill;
which was read twice and referred to the
Committee on Interstate Commerce.

A bill authorizing and directing the Interstate Commerce Commission to establish a system of mileage books to be issued to commercial travelers at a reduced rate by all railroad companies carrying passengers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate Commerce Commission be, and it is hereby, authorized, empowered, and directed to fix and establish on all passenger-carrying railroads a system of interchangeable mileage books of one thousand and two thousand miles each for the use of commercial travelers, to be sold them by the railroad companies at a rate of 20 per centum less than the regular passenger-fare rates.

67th Congress, 1st Session.

S. 848.

In the Senate of the United States.

April 13 (calendar day, April 16), 1921.

Mr. Watson of Indiana introduced the following bill; which was read twice and referred to the Committee on Interstate Commerce.

A bill to amend section 22 of the Interstate Commerce Act by permitting the issuance of interchangeable mileage tickets on railroads, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 22 of the Interstate Commerce Act is amended by inserting "(1)" after the section number at the beginning of such section and by striking out

all after the first proviso of such section and inserting at the end of such section two new paragraphs to read as follows:

“(2) Each common carrier by railroad, or partly by railroad and partly by water, within the continental United States subject to this Act, shall issue interchangeable nontransferable five thousand-mile tickets (including the privilege of carrying baggage free to the amount of pounds), to be sold at the rate of $2\frac{1}{2}$ cents a mile, for transportation of persons on any lines of such carrier or any other such carrier, without regard as to whether the points of origin and destination for any single journey are within the same State. The commission, by order, (a) may initiate and establish such classifications, regulations, and practices relating to such tickets, (b) may make such regulation as it deems necessary for the enforcement of the provisions of this paragraph, and (c) shall modify the rate established by this paragraph, whenever in its opinion there is, after this paragraph takes effect, a substantial alteration in the average rate level for the transportation of persons by such carriers throughout the country as a whole, so as to increase or decrease such rate directly in proportion, as nearly as the commission deems practicable, to such alteration in such average rate level. Any ticket unused in whole or in part at the time of any such modification, may be redeemed at the same rate per mile as that for which it was purchased. No common carrier shall demand, collect, or receive greater or less compensation for the transportation of persons or baggage under any such five thousand-

mile ticket than that required by the provisions of this paragraph or any order of the commission issued thereunder; or refuse to accept any such ticket, for the transportation of persons as provided in this paragraph.

“(3) If any provision of paragraph (2) or the application thereof to any person or circumstance is held invalid, the validity of the remainder of such paragraph and the application of such provision to other persons and circumstance shall not be affected thereby.”

67th Congress, 1st Session.

S. 1085.

In the Senate of the United States.

April 25, 1921.

Mr. Lenroot introduced the following bill; which was read twice and referred to the Committee on Interstate Commerce.

A bill authorizing and directing the Interstate Commerce Commission to establish a system of mileage books to be issued at a reduced rate by all railroad companies engaged in interstate commerce.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate Commerce Commission be, and it is hereby, authorized and directed to fix and establish on all passenger-carrying railroads engaged in interstate commerce a system of interchangeable mileage books of two thousand and five thousand miles each which shall be sold by said railroad companies at a rate of 20 per centum less than the established passenger-fare rates.

The Interstate Commerce Commission is further authorized to make all regulations necessary to insure that each railroad upon which such mileage books are used shall receive its proper share of the money paid for the same.

67th Congress, 1st Session.

S. 1167.

In the Senate of the United States.

April 25 (calendar day, April 26), 1921.

Mr. Spencer introduced the following bill; which was read twice and referred to the Committee on Interstate Commerce.

A bill authorizing and directing the Interstate Commerce Commission to issue mileage books of not less than one thousand miles and at a reduction of 20 per centum from the established rate.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the interstate passenger rates as now or hereafter in force shall provide for the issuance of mileage books of not less than one thousand miles and at a reduction of 20 per centum from the established rate. That the Interstate Commerce Commission is hereby authorized and directed to take such action as may be necessary to carry into effect the operation of this provision.

67th Congress, 1st Session.

S. 1318.

In the Senate of the United States.

April 28, 1921.

Mr. Spencer introduced the following bill; which was read twice and referred to the Committee on Interstate Commerce.

A bill authorizing and directing the Interstate Commerce Commission to issue interchangeable mileage books of not less than one thousand nor more than five thousand miles, and at a reduction of 33 1/3 per centum from the established rate.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the interstate passenger rates, as now or hereinafter in force, shall provide for the issuance of interchangeable mileage books of not less than one thousand nor more than five thousand miles, and at a reduction of 33 1/3 per centum from the established rate. That the Interstate Commerce Commission is hereby authorized and directed to take such action as may be necessary to carry into effect the operation of this provision.

67th Congress, 1st Session.

S. 1374.

In the Senate of the United States.

April 28 (calendar day, April 30), 1921.

Mr. Harris introduced the following bill; which was read twice and referred to the Committee on Interstate Commerce.

A bill authorizing and directing the Interstate

Commerce Commission to provide for the granting of reduced passenger rates by all railroad companies doing an interstate business through the sale of interchangeable mileage books of not less than one thousand miles.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate Commerce Commission is authorized and directed to provide for a system of interchangeable books of not less than one thousand miles each and to direct their sale to the public at a rate of 33 1/3 per centum less than the regular passenger-fare rates by all railroads operating an interstate passenger service.

67th Congress, 1st Session.

S. 1447.

In the Senate of the United States.

May 2, 1921.

Mr. Robinson introduced the following bill; which was read twice and referred to the Committee on Interstate Commerce.

A bill to direct railroads engaged in interstate commerce to issue mileage books.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within thirty days from the passage of this Act passengers traveling on railroads engaged in interstate commerce shall have the privilege of purchasing and using in payment of their transportation mileage books which shall be issued under rules and regulations prescribed by the Interstate Commerce

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Commission. Said mileage books shall be interchangeable, shall contain transportation in the aggregate of not less than one thousand miles, and shall be sold at the rate of 2 1/2 cents per mile. The Interstate Commerce Commission shall have the power to make reasonable rules and regulations for carrying into effect this Act.

67th Congress, 1st Session.

H. R. 2894.

In the House of Representatives.

April 13, 1921.

Mr. Kahn introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.

A bill to amend section 22 of the Interstate Commerce Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 22 of the Interstate Commerce Act is amended by inserting "(1)" after the section number at the beginning of such section and by striking out the second proviso of such section and inserting at the end of such section two new paragraphs to read as follows:

"(2) Each common carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to this Act, shall issue interchangeable non-transferable five-thousand-mile tickets (including the privilege of carrying baggage free to the amount of —pounds), to be sold at the rate of 2½ cents

a mile, for transportation of persons on any lines of such carrier or any other such carrier, without regard as to whether the points of origin and destination for any single journey are within the same State. The commission by order (a) may initiate and establish such classifications, regulations, and practices relating to such tickets, (b) may make such regulations as it deems necessary for the enforcement of the provisions of this paragraph, and (c) shall modify the rate established by this paragraph, whenever in its opinion there is, after the passage of this amendatory Act, a substantial alteration in the average rate level for the transportation of persons by such carriers throughout the country as a whole so as to increase or decrease such rate directly in proportion, as nearly as the commission deems practicable, to such alteration in such average rate level. Any ticket unused in whole or in part at the time of any such modification, may be redeemed at the same rate per mile as that for which it was purchased. No common carrier shall demand, collect, or receive greater or less compensation for the transportation of persons or baggage under such five-thousand-mile ticket than that required by the provisions of this paragraph or any order of the commission issued thereunder; or refuse to accept any such ticket for the transportation of persons as provided in this paragraph.

“(3) If any provision of paragraph (2) or the application thereof to any person or circumstance is held invalid, the validity of the remainder of such paragraph and the application

of such provision to other persons and circumstance shall not be affected thereby."

67th Congress, 1st Session.

H. R. 5037.

In the House of Representatives.

April 25, 1921.

Mr. Barkley introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.

A bill authorizing and directing the Interstate Commerce Commission to establish a system of mileage books to be issued at a reduced rate by all railroad companies carrying passengers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate Commerce Commission be, and it is hereby, authorized, empowered, and directed to fix and establish on all passenger-carrying railroads a system of interchangeable mileage books of one thousand, two thousand, and five thousand miles each to be sold by the railroad companies at a rate of 33 1/3 per centum less than the regular passenger-fare rates.

67th Congress, 1st Session.

H. R. 5362.

In the House of Representatives.

April 27, 1921.

Mr. Flood introduced the following bill; which was referred to the Committee on Interstate

and Foreign Commerce and ordered to be printed.

A bill authorizing and directing the Interstate Commerce Commission to issue mileage books of not less than one thousand miles and at a reduction of $33 \frac{1}{3}$ per centum from the established rate.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the interstate passenger rates as now or hereafter in force shall provide for the issuance of interchangeable mileage books of not less than one thousand miles and at a reduction of $33 \frac{1}{3}$ per centum from the established rate. That the Interstate Commerce Commission is hereby authorized and directed to take such action as may be necessary to carry into effect the operation of this provision.

67th Congress, 1st Session.

H. R. 6744.

In the House of Representatives.

June 1, 1921.

Mr. Jacoway introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.

A bill to amend for the period of one year section 22 of the Interstate Commerce Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the period of one year section 22 of the Interstate Commerce

Act is amended by inserting "(1)" after the section number at the beginning of such section, and by striking out the second proviso of such section and inserting at the end of such section two new paragraphs to read as follows:

"(2) Each common carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to this Act, shall issue for the period of one year interchangeable nontransferable two thousand mile tickets (including the privilege of carrying baggage free to the amount of one hundred and twenty-five pounds), to be sold at the rate of $2\frac{1}{2}$ cents a mile, for transportation of persons on any lines of such carrier or any other such carrier without regard as to whether the points of origin and destination for any single journey are within the same State. The commission by order (1) may initiate and establish such classification, regulations, and practices relating to such tickets; (2) may make such regulations as it deems necessary for the enforcement of the provisions of this paragraph; and (3) shall modify the rate established by this paragraph whenever in its opinion there is, after the passage of this amendatory Act, a substantial alteration in the average rate level for the transportation of persons by such carriers throughout the country as a whole, so as to increase or decrease such rate directly in proportion, as nearly as the commission deems practicable, to such alteration in such average rate level. Any ticket unused in whole or in part at the time of any such modification may be re-deemed at the same rate per mile as that for

which it was purchased. No common carrier shall (a) demand, collect, or receive greater or less compensation for the transportation of persons or baggage under any such two thousand mile tickets than that required by the provisions of this paragraph or any order of the commission issued thereunder, or (b) refuse to accept any such ticket for the transportation of persons as provided in this paragraph.

“(3) If any provision of paragraph (2) or the application thereof to any person or circumstance is held valid, the validity of the remainder of such paragraph and the application of such provision to other persons and circumstance shall not be affected thereby.”

67th Congress, 1st Session.

H. R. 6780.

In the House of Representatives.

June 2, 1921.

Mr. Jacoway introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.

A bill to amend for the period of one year section 22 of the Interstate Commerce Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the period of one year section 22 of the Interstate Commerce Act is amended by inserting “(1)” after the section number at the beginning of such section, and by striking out the second proviso of such

section and inserting at the end of such section two new paragraphs, to read as follows:

“(2) Each common carrier by railroad, or partly by railroad and partly by water, within the continental United States, subject to this Act, shall issue for the period of one year interchangeable nontransferable two-thousand-mile tickets (including the privilege of carrying baggage free to the amount of one hundred and fifty pounds), to be sold at the rate of $2\frac{1}{2}$ cents a mile, for transportation of persons on any lines of such carrier or any other such carrier without regard as to whether the points of origin and destination for any single journey are within the same State. The commission by order (1) may initiate and establish such classification, regulations, and practices relating to such tickets; (2) may make such regulations as it deems necessary for the enforcement of the provisions of this paragraph; and (3) shall modify the rate established by this paragraph whenever in its opinion there is, after the passage of this amendatory Act, a substantial alteration in the average rate level for the transportation of persons by such carriers throughout the country as a whole, so as to increase or decrease such rate directly in proportion, as nearly as the commission deems practicable, to such alteration in such average rate level. Any ticket unused in whole or in part at the time of any such modification may be redeemed at the same rate per mile as that for which it was purchased. No common carrier shall (a) demand, collect, or receive greater or less compensation for the transportation of persons or baggage under any

such two-thousand-mile tickets than that required by the provisions of this paragraph or any order of the commission issued thereunder, or (b) refuse to accept any such ticket for the transportation of persons as provided in this paragraph.

“(3) If any provision of paragraph (2) or the application thereof to any person or circumstances is held invalid, the validity of the remainder of such paragraph and the application of such provision to other persons and circumstances shall not be affected thereby.”

67th Congress, 2d Session.

H. R. 11686.

In the House of Representatives.

May 16, 1922.

Mr. Reece introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce and ordered to be printed.

A bill, to direct railroads engaged in interstate commerce to issue mileage books.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within thirty days from the passage of this Act passengers traveling on railroads engaged in interstate commerce shall have the privilege of purchasing and using in payment of their transportation mileage books which shall be issued under rules and regulations prescribed by the Interstate Commerce Commission. Said mileage books shall be interchangeable, shall contain transportation

in the aggregate of not less than one thousand miles, and shall be sold at the rate of $2\frac{1}{2}$ cents per mile. The Interstate Commerce Commission shall have the power to make reasonable rules and regulations for carrying into effect this Act.

APPENDIX B.

LEGISLATIVE HISTORY OF THE AMENDMENT TO
SECTION 22.

Fourteen bills, as is shown by Appendix A herein, were introduced into Congress between April and June, 1921 (with the exception of one introduced in May, 1922). These bills were all referred to the respective Committees on Interstate Commerce (see Appendix A).

On December 22, 1921, the Senate Committee was discharged from further consideration of the bill (S. 848) which it was then considering (Congressional Record, vol. 62, p. 159).

On January 11, 1922, the Senate took up the consideration of this bill.

On January 18th Senator Cummins introduced an amendment requiring the issuance of interchangeable mileage tickets "at a just and reasonable rate per mile," instead of at $2\frac{1}{2}$ cents per mile as in S. 848 (Congressional Record, vol. 62, p. 1516). Senator Cummins addressed the Senate at length on January 18th and 19th on his proposed amendment, his remarks, some of which we quote below, appearing at length at pages 1577 to 1588 of the Congressional Record. He also had printed into the Record, at page 1587, a letter written to him by the Interstate Commerce Commission.

Senator Cummins' amendment was adopted by the Senate on January 21, 1922 (Congressional Record, vol. 62, p. 1690). As so amended, the bill was passed by the Senate on the same day (*ibid*).

The Senate bill then went to the House, where on January 23d it was referred to the Committee

on Interstate and Foreign Commerce (Congressional Record, vol. 62, p. 1812). It was reported out of the Committee with amendments on June 13, 1922 (Congressional Record, vol. 62, p. 9467).

On June 29th it was amended by the House by inserting the words "or scrip coupon" after the word "mileage," by striking out the word "interstate" (which had limited the application of tickets to interstate commerce), and by adding the provision permitting the Interstate Commerce Commission to exempt certain carriers (Congressional Record, vol. 62, pp. 10,460-10,462). As so amended it was passed by the House on the same day (p. 10,462).

The House amendments were all accepted by the Senate on July 1, 1922 (Congressional Record, vol. 62, p. 10,649). The bill became law on August 18, 1922.

As above stated, the bill, as originally presented to the Senate, required mileage books to be used and sold at a rate of $2\frac{1}{2}$ cents per mile. It was in effect conceded that such a bill could not be constitutionally enacted. *L.S. & M.S. Ry. Co. v. Smith*, 173 U.S. 684 (pp. 1578-1579). And a number of amendments to the bill were under consideration and discussion, one of which was designed to invest the Interstate Commerce Commission with authority and jurisdiction to determine the just and reasonable rate at which such mileage or scrip books should and could be issued and sold. In the course of the debate in the Senate on January 18, 1922, Senator Cummins, author of the proposed amendments, at page 1577 of the Congressional Record, said:—

"I think I ought to say another word, in a preliminary way, so that my position with regard to the general subject may not be misunderstood. I believe in the system of mileage books or tickets; I believe that form of transportation with respect to a great many people is exceedingly convenient. I think that the practice of issuing mileage books in this country ought to be resumed, and I have no doubt whatever that the Interstate Commerce Commission, when vested with the power, which it has not now, in my opinion, to require railroad companies to issue interchangeable mileage books, will speedily make the necessary order.

"The question, however, with regard to the difference which shall be established between the ordinary ticket and the mileage book is a question upon which we are not qualified to express a judgment. While the Senator from Arkansas has paid me a very great compliment, which I deeply appreciate, I want to say in all candor that even though I have studied this subject for many years it would be utterly impossible for me, with the information I have, to determine what should be the difference, if any, between the ordinary ticket for a specific journey and the mileage book good for any journey."

And further, on page 1578:

"It must be observed from what I have stated that I do not approach the discussion of this question in a hostile spirit. I mean, I recognize the demand which the

commercial travelers of the United States have made for this form of transportation, and I am not prepared to say that they should not have the privilege of buying transportation at wholesale at lower rates than the person who buys a specific ticket for a particular journey. In so far as the selling of transportation in this way and in so far as all the operations which are connected with that transportation are concerned which tend to reduce the cost of the service, the Interstate Commerce Commission may very well, in my judgment, establish a lower rate per mile than the ordinary rate which is now in force or which may be in force at any given time."

And again, on page 1579:

"Mr. President, I believe that the Interstate Commerce Commission, in accordance with the principle of this opinion, after it makes the proper investigation, and after it determines that the cost of the service, if it so finds, is less in the case of mileage tickets than in the case of specific tickets, can make a reasonable, fair reduction in passenger fares in behalf of those who use mileage tickets; but it must not be an arbitrary reduction. It must be based upon sound, economic reasons. . . .

"In this case if the commission, after its investigation, finds that the railroads can afford, by reason of lessened cost, to sell 5,000-mile tickets or 2,000-mile tickets, I believe it has, or would have if my amend-

ment were passed, the authority to require the railroads to issue those tickets; but an act simply declaring that every railroad in the United States shall issue 5,000-mile tickets, usable and good upon every other railroad in the United States, when the rate established by the commission as a fair and reasonable rate for travel is substantially 1 cent per mile higher than that mentioned in the bill before us, is beyond our power. It is not only unfair and unjust, but it is not within our constitutional authority to enact.

"Every man who knows anything about the subject knows that there is not the difference of 1 cent or 1 1/3 cents per mile in the cost of the service, comparing mileage tickets and specific tickets. There may be some difference; I am not prepared to say what it is. I am not well enough informed to say what it is, any more than I am well enough informed to say what should be the rate upon a carload of apples from Arkansas to Chicago or New York. Whenever the Congress of the United States enters upon the field of determining at what rate either commodities or persons shall be carried throughout the United States, it will not only enter a field of chaos and confusion but it will inflict infinite injury not on the railroads alone but upon the commerce of the country as well."

And again, on pages 1579 and 1580:

"It would not require so many agents to sell these tickets as would be required if the

tickets were sold for each 10 miles or each 100 miles. That is simply an illustration. In so far as the use of transportation in that form reduces the cost of the service, I believe that it is constitutional and would be within the authority of the commission, if we adopt the amendment I have offered, to reduce the mileage rate of these mileage tickets or books to that extent; but when it comes to the further question of allowing a commercial traveler, simply because he is a commercial traveler, to travel at less than I have to pay when I travel, I rebel."

And on January 19, 1922, in the course of a further discussion of the bill, Senator Cummins, at page 1586, said:

"I propose to give the Interstate Commerce Commission authority to compel railroad companies to issue mileage books good for not more than 5,000 nor less than 1,000 miles at a just and reasonable rate. That is all. I can conceive of reasons which would justify some difference between the general rate and the mileage-book rate, because there is, I can easily see, some lessened cost of service when one buys 2,000 or 5,000 miles of transportation as against a man who buys 20 or 25 miles of transportation. But I do not pretend to know what that difference would be, if any. It must be supported by such evidence as will show that it is not a discrimination against the man who uses the ordinary ticket.

"I am sorry the Senator from Wisconsin

did not quite gather the full import of my amendment. That is the very point I want to avoid. I want the discrimination, if there shall be one, based upon sound, economic reason, and there are some reasons that might influence the commission to issue a mileage book at a slightly less rate than the price of the ordinary ticket."

At pages 1584 to 1588 Senator Cummins commented at length upon a letter addressed to him by the Interstate Commerce Commission in reply to his request for the Commission's opinion on Senate Bill No. 848. The Commission's letter is printed in full at pages 1587 and 1588. We quote portions of it:

"INTERSTATE COMMERCE COMMISSION,
Washington, January 11, 1922.

HON. ALBERT B. CUMMINS,

United States Senate, Washington, D.C.

My dear Senator: The commission has considered Senate bill No. 848, sent to Chairman McChord with your letter of January 3, and referred the matter to its legislative committee for reply. In response to your request this committee submits the following information: . . .

. . . Assuming that the transportation service performed is substantially the same as that furnished for the standard passenger fare, it would seem that the only basis for a distinction in price is the quantity of transportation purchased. If sound, this would, of course, warrant lower rates for large shippers than for their smaller competitors.

The commission has, from the time it was created, opposed any rates based on what may be called the 'wholesale' theory. In *re* Mileage Books (28 I.C.C., 318, 323), we called attention to the fact that if it were not for the authorization in section 22 of the act, 'it is debatable whether the concession from the regular fare made to the purchasers of mileage books would be lawful.'

It may be appropriate to mention the fact that, while 'mileage, excursion, or commutation passenger tickets' are grouped together in section 22, excursion and commutation fares are ordinarily used in a service which is distinct in many particulars from the regular passenger service.

It may be proper to remark that in the past bills somewhat similar to this one have been referred to us for our views, and we have expressed our disapproval of them, not only on the grounds indicated but on account of the inadvisability, as it seems to us, of fixing rates or fares by statute.

It has seemed to us that when reductions in fares were warranted they should be made in such a way that all travelers could benefit by them. . . .

The bill, in effect, creates a privileged or favored class into which no one may enter who has not \$125 available for the purpose. Whatever reduction in cost of travel is thus effected would inure, not to

those of small means, who need it most, but to those with abundant moneys in hand, who need it least. . . .

The bill does not declare the existing base fares to be unreasonable. It amends an act under which we have found them reasonable. But, without any finding of that reasonableness which the act enjoins upon all rail carriers, it proposes to require them all to establish and maintain a much lower rate per mile for those who can afford to lay out \$125 in order to secure it. . . .

The bill disregards the fact that the President, through the director general, determined that a base rate lower than 3 cents per mile was too low and that the commission has since authorized 20 per cent increase in that base rate.

It further raises the question whether any rail carrier subject to the act could justify any base higher than 2.5 cents per mile for any passenger after this bill should become law.

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The ticket may be issued and all the money collected by a carrier which does not participate in the transportation and is financially irresponsible.

These are some of the obvious defects of the bill.

In conclusion your attention is invited to *Lake Shore, etc., Railway Co. v. Smith* (173 U.S. 684), where the Supreme Court held that it was unconstitutional for the State of Michigan, after prescribing certain maxi-

mum fares, to require the sale of mileage tickets at a considerably lower rate per mile.

Very truly, yours,

JOHN J. ESCH.

(For Legislative Committee)
Commissioner."

On January 20, 1922, dealing with a slightly different phase of the situation, that is, as to the possibility of a reduction in passenger rates resulting in an increase in net income to the railroads from passenger service, Senator Cummins, at page 1631 of the Congressional Record, said:

"The position which I attempted to announce yesterday was this: I am not qualified to express an opinion upon the point just stated by the Senator from South Carolina. There are 11 men who constitute the Interstate Commerce Commission. They have given the subject constant study with all the aids which can possibly be summoned to enlighten their judgment. They think, obviously, that a decrease in the passenger rates would not increase the net income of the railroads from passenger service.

"I would rather accept their judgment upon that question than to rely upon my own; and, if the Senator will accept it in the spirit in which I state it, I would rather rely upon their judgment on that point than upon the judgment of the Senator from South Carolina or any other Senator or any other Member of Congress.

"It is for that reason, and that reason

alone, that I am opposing the passage of this bill in its present form. I believe that it is a question which ought to be decided from time to time by the Interstate Commerce Commission and not by Congress. In other words, I think the Interstate Commerce Commission is better qualified than Congress is to say what the rates, both passenger and freight, should be, in order to do justice at once to the people of the country and to the railroads of the country. We have never tried to do it before, and I am hoping that we will not attempt it at this time."

The bill was further discussed in the Senate on January 21st, and passed the Senate on that date in the form appearing on page 1691 of the Congressional Record, which need not be quoted here. It is only necessary to say that the bill, as it passed the Senate, merely directed the Commission to require, after notice and hearing, the carriers to issue joint interchangeable mileage tickets at a just and reasonable rate per mile, the rate, of course, to be determined by the Commission. The bill, as it passed the Senate, went to the House and was referred to the House Committee on Interstate and Foreign Commerce, and extensive hearings were held by that committee, at which those favoring and those opposed to the bill were heard. As appears from page 10,455 of the Congressional Record of June 29, 1922, and as was stated by Representative Huddleston, a member of the Committee on Interstate and Foreign Commerce, after reference

to the fact that commercial travelers were urging the passage of the mileage-book bill, the bill to meet the demands of the commercial travelers was introduced in the Senate and was there passed after the Senate, to use his language, "had materially changed it and cut the heart of it." Further using his language: "Then the bill came to the House and our Committee on Interstate and Foreign Commerce proceeded to emasculate it and remove its vital organs." Going on to discuss the bill, he says (p. 10,455):

"Excuse me for a moment. This bill was intended by the commercial travelers to secure for themselves and for others who may desire to do a good deal of traveling and who have the money to put up a definite reduction in fares. They intend it to secure such reduction by means of a universal interchangeable mileage book.

"I suppose the committee thought the commercial travelers were easy to fool, for they amended the bill by inserting the language 'or scrip coupon tickets' after the mileage-book phrase. This was a complete change in the purpose of the bill, for a scrip coupon ticket is as much like a mileage book as a Kentucky saddle horse is like a spotted bull. They have no relation to each other. The mileage book is composed of units each of which is good for a mile travel. A scrip coupon ticket is composed of units to be used in place of money to purchase tickets.

"Note, now, that there is no requirement that this coupon ticket shall be sold at a discount. The requirement is merely that

it shall be issued 'at a just and reasonable price.' This language would lead uninformed people to think that it was intended to sell the coupon ticket at a discount; that a just and reasonable price for a coupon book would be less than the regular price for a ticket. But the fact is, and members of the committee know it—whether they will tell you so or not it is true, and I challenge them to deny it—that the only evidence offered before our committee showed that these coupon tickets produced no economy or saving to the railroads and can not be sold at any discount.

"Therefore, if the Interstate Commerce Commission does exactly what this Bill instructs them to do they will issue the coupon tickets at an increased price over the regular tickets. Instead of the commercial travelers being able to buy a coupon ticket at a discount, they will have to give a premium, because such tickets work certain losses to the railroads and they can not afford to put them out at the same price. This was all the evidence before the committee. Now, let any member of the committee deny that if he dares.

"They asked for bread and we have given a stone. We have brought forth a Bill pretending we are going to give the commercial travelers lower fares, and yet if they go ahead and buy a coupon ticket instead of traveling at regular fare they will have to pay a premium."

And then, in explaining what this course of action will be, on the same page, he said:

"I am in a funny quandary. If this Bill meant what its sponsors want it to mean and what the committee are pretending that it means—that is, that purchasers of mileage books and coupon tickets shall ride the trains at the expense of the general public—of course I could not vote for it. On the other hand, if it means that all such persons are to pay their own way, which, if the evidence before the committee is to be believed, will be as much or more than the general public will pay, there can be no objection to passing the Bill. The thing that sticks me is I do not like to be a party to perpetrating a fraud on the commercial travelers or anybody else."

On page 10,457 Representative Winslow, Chairman of the Committee on Interstate and Foreign Commerce, who was in charge of the bill in the House, used this language:

"The Bill which came to us from the Senate was merely a Bill to direct the Interstate Commerce Commission, after a careful inquiry, after notice and hearing, to require each rail carrier coming under the Interstate Commerce Act to issue mileage books under such regulations and conditions as the commission might see fit to establish. That is all there was to the Bill.

"The Senate never intended to express any opinion on the mile price of mileage or on what might have been the original base

cost of mileage or to do anything other than to give direction to the Interstate Commerce Commission to issue mileage books under regulations, and so forth. That is all any proponent of the Bill asked the Senate to do."

Responding to the charge by Representative Huddleston of Alabama that the bill in question was a pretense of doing something and yet doing nothing, another member of the House Committee on Interstate and Foreign Commerce, Mr. Hawes, at page 10,459 of the Congressional Record, in pointing out that the commercial travelers and others favoring the bill clearly understood its nature and effect, made the following statement:

"Mr. Chairman and gentlemen of the House, as a member of the committee that studied this Bill and recommends its passage I would not have the impression go out, as indicated by the gentleman from Alabama, that the proponents of this measure do not understand the Bill and every portion of it.

"I asked the counsel for the Travelers' Association, composed of 600,000 men, whether they understood this Bill to mean that rates would be lowered or if, on the contrary, whether the Interstate Commerce Commission could not, if it desired, actually raise the rates. He said that was his understanding. So this Bill does but one thing—it provides a forum for the traveling men of the United States where they can be heard in asking for an interchangeable mile-

age book or interchangeable scrip tickets. This Bill provides a place of hearing. If the national rate-making body desires to lower the rate it is for them to say upon full hearing and investigation. They may actually, if they so desire, raise the rates. So the traveling men of America, if the House passes this Bill, are not being deceived. They understand exactly what the Bill provides for. It is true that the original Bill introduced in the Senate had a fixed rate per mile, but in the argument before the committee in the Senate and upon the floor of the Senate the proponents of this Bill discovered that could not be done; that Congress could not fix rates for railroads. So when the Bill came to the House before our committee, they had abandoned that position. They understand this Bill thoroughly; they want it passed; there is no misunderstanding about it, and all it does is to provide a forum, a place of hearing, for the traveling men of America."

When the House Committee amendments were under discussion, Mr. Newton, a member of that Committee, had the following to say regarding the proposed amendment to strike out the word "interstate":

"When the bill came from the Senate the mileage book so issued would be 'good for interstate passenger carriage' only. This would be of little benefit to the commercial travelers.

"Of the great bulk of commercial travelers

most of their trips are from town to town, which would be an intrastate carriage. The mileage book would not be valid for such carriage. . . . Hence the committee amendment to strike out 'interstate' " (Congressional Record, vol. 62, p. 10,460).

When the bill as passed by the House was under discussion in the Senate, Senator Pomerene spoke as follows regarding the House amendment striking out the word "interstate":

"Another objection to the bill as it then was was this: It would have required the railroads to accept these coupons or tickets not only in interstate passenger traffic but in intrastate passenger traffic as well, and, as it was then drawn, on all roads. After a very careful examination of the subject and very serious discussion, particularly by the lawyers of the committee, we felt that the legislation should be limited to interstate passenger traffic, the words 'interstate traffic' to be defined as the courts have heretofore defined them.

"Of course, all recognize that under the decisions of the courts there may be and is such a relation between intrastate traffic and interstate traffic that they are interdependent upon each other when it comes to the determination of what shall be proper rates and rates which are not confiscatory. For that reason we inserted the word 'interstate' before the words 'passenger carriage,' so as to make the legislation apply to interstate traffic. It developed at that time—at least, according to the estimate of one gen-

tleman who was here advocating this measure—that about 60 per cent of the passenger traffic was intrastate and about 40 per cent was interstate. The Senate of the United States passed this bill limiting its provisions to interstate traffic because those who were familiar with the subject felt that the Senate ought to pass a bill which was constitutional in the judgment of the Senate. The bill as it was messaged to the House of Representatives read:

“ ‘A just and reasonable rate per mile good for interstate passenger carriage upon the passenger trains’—

“ ‘And so forth. The House of Representatives struck out the word ‘interstate’.

“ ‘What construction would ordinarily be given by anyone who was investigating the history of this legislation to that action on the part of the House? The very fact that the House struck out the word ‘interstate’ would indicate that that body did not want to limit the use of these mileage tickets to interstate traffic, but desired to have those books usable on both kinds of traffic, intrastate as well as interstate. If those who appeared before the members of the committee and discussed this question are right in their belief that 60 per cent of the passenger traffic is intrastate, it is going to raise a question of very great importance both to the railroads and to the passengers.

“ . . . The effect, in my judgment, of this bill is going to be that the traveling public will be led to believe that mileage books

made interchangeable shall apply to intrastate traffic as well as interstate traffic. I do not believe that can be done.

"It may be that the Interstate Commerce Commission will accept this bill and issue an order making it applicable to intrastate business as well as to interstate business; it may be that the railroads will accept such an order; but I do not believe they will, or at least some of them will not.

"That is the situation, and it seems to me that it would have been in the interest of certainty if the House had concurred in the Senate bill as it was passed. I believe that there is a certain amount of convenience to be attached to the use of interchangeable mileage books, and I should like to see the traveling public have the benefit of them; but I do not want to be put in the position where it may be said of the Congress, 'They gave us something here; we had reason to believe that it was a constitutional law; we had reason to believe that interchangeable mileage books would be accepted in intrastate travel; and we find now that we have been deceived.' My judgment is that striking out the word 'interstate' renders the bill unconstitutional; and while I am not going to object to its consideration and its passage, if other Senators want to take the responsibility, as I see the legal question involved, I can not, under my oath as I conceive it to be, vote for this bill. Accordingly I am going to vote against it" (Congressional Record, vol. 62, pp. 10,647, 10,648).

APPENDIX C.

INTERSTATE COMMERCE COMMISSION DECISIONS
CITED IN NOTE 4, PAGE 324, OF THE OPINION IN
NASHVILLE, C. & ST. L. R. v. TENNESSEE, 262
U.S. 318:

Sprigg v. B. & O. R. Co., 8 I.C. Rep. 443 (1900):

Defendants withdrew the 180-trip quarterly ticket between Baltimore and Washington. This ticket had been in use for about fifteen years.

Complainants were users of the 180-trip tickets. The Commission found that—

Commutation rates produce discrimination against places which do not get them, but that does not necessarily constitute *unjust* discrimination. It is sanctioned by section 22.

The carriers are to be condemned for withdrawing a privilege so long granted by them “as to have the appearance and hold out the inducements of a permanent policy.” But they *had the legal right to withdraw it*.

The complainants demand a special rate, which admittedly would be unremunerative if applied to the entire volume of traffic. They do not attack present rates or relations as unreasonable.

The Commission, speaking by its chairman, said (pp. 451-456, *passim*):

“The Commissioner has no power to impose such a requirement. It would be beyond our jurisdiction to make the order asked for in this proceeding, even if satisfied of the justice and equity of complainants’ demands. The theory and purpose of the law are opposed to privileges not enjoyed

by all persons alike, and we have no authority to attempt the enforcement of special agreements for the benefit of a particular class. Under the provision of the 22d section above quoted, carriers are allowed to issue mileage, excursion and commutation tickets, but ordinarily they cannot be compelled to do so. The permission does not create an obligation. To the extent necessary for their use, tickets of the description named are exempt from the general rules of the statute. Compliance with those rules may be directed by us, but requiring exceptions thereto is not within our province; and this applies as well to the restoration of such tickets where they have been withdrawn as to the refusal to furnish them where their introduction has been requested. It may be that the allowance of commutation rates at stations on one line of a railway system, and the denial of such rates at stations on another line of the same system, such stations respectively being *of similar character* and at similar distances from a common terminus, would be an undue preference within our power to correct; but that question is not before us. Upon the facts presented we have no authority to grant relief. . . .

“In whatever aspect the question is considered the argument for complainants comes to this, that carriers can be compelled, under such circumstances as are disclosed in this case, to put in discriminating rates, provided they are not unduly discriminating.

Because they are permitted to sell commutation tickets, therefore they can be forced to do so. At least, if they have sold such tickets for a considerable period they can be required to continue to sell them, although at a rate much below the sum justly charged to the general public. There is no legal basis for such a contention. If we had full rate-making power, as ample and complete as that possessed by the Congress itself, we could not make such an order. We could in that case prescribe a rate which would be reasonable for everybody to pay, and in determining what that rate should be we could take into account the price at which commutation tickets had been sold, the length of time they were furnished, and all other facts bearing upon the reasonableness of a common public rate for the territory and travel in question; but we could not under any circumstances compel the granting of a special and lower rate for the benefit of a particular class.

“This conclusion is fully supported by the case of *Lake Shore & M. S. R. Co. v. Smith* . . . (discussion and quotation therefrom).

“A careful study of this opinion convinces us that the principle announced by the Supreme Court is of decisive application to the case in hand. Manifestly, the power of the Commission cannot be greater than the power of Congress or a State legislature to control or prescribe the rates of railroad carriers. And if the courts would not uphold an act of legislation which re-

quired these defendants to grant special rates to complainants and others in like situation, it is plain that an order of the Commission directing them to do so would be equally invalid for want of authority to make it.

"The Party Rate Case (Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U.S. 263, 4 I.C.R. 92) presents no different view and permits no different inference. It simply affirmed the right of the defendant in that case to sell party-rate tickets if it chose to do so. So far from holding that a carrier can be compelled to furnish such tickets, everything said in the opinion is to the contrary import. The difference between voluntary action and legal compulsion is illustrated by both decisions. Yet if the principle contended for by complainants is sound, why would it not lead to requiring the sale of party-rate tickets,—especially by a carrier which had previously sold them?

"As respects the question of power, we are unable to see any distinction between ordering the granting of a special rate not before furnished, and ordering the restoration of such a rate which has been withdrawn after being allowed for a given period. If the offering of commutation tickets originally rests in the discretion of the carrier, the discontinuance of such tickets must be equally within its discretion. What provision of the Act can be invoked to require a carrier to keep on making special

rates which it has voluntarily established, when it cannot be compelled to put in such rates in the first instance? The rates actually charged when complaint is made or investigation had are the rates to be passed upon by the Commission. If lower rates have been previously accorded, whether for a longer or shorter time, that fact is pertinent and entitled to full consideration, but the question to be decided in every case is whether under all the circumstances the existing rates available to the general public are just and reasonable. If they are, there is no power to compel exceptional and lower rates for a special class of passengers.

“It does not by any means follow that carriers can withdraw the various commutation privileges they have been accustomed to grant, and *lawfully* charge all persons the rates at which single one-way tickets have been sold . . . If these defendants should discontinue all their commutation, excursion and round-trip tickets, . . . even then the question would be, as respects our power under the present law or under any law, What rates under those circumstances, and in view of the far lower rates so long accorded, would be just and reasonable for everyone to pay? We could not go further, and require another and lower rate for the benefit of any class in any locality. There can be no legal obligation on the part of the carrier to observe a rate which is just to the general public, and also to provide a special and more favorable rate

for some portion of the public. The commutation rate is necessarily a preferential rate. It is one thing to say that it may be allowed without subjecting the carrier to the charge of undue preference; it is quite another thing to say that it must be granted provided it is not unduly preferential."

(Clements, Commissioner, dissents on the question of the carriers' right to *withdraw* rates—not on the question of the Commission's right to compel their establishment—see p. 479.)

Field v. So. Ry. Co., 13 I.C. Rep. 298 (1908):

Petition that Commission compel re-establishment of special party rates which in past years had generally 'been accorded to theatrical companies and special organizations engaged in giving public exhibitions.

The Commission, speaking by Commissioner Harlan, said (pp. 298-299):

"It is clear that the Commission has no authority to enter such an order. While the act to regulate commerce as amended confers upon the Commission the power to reduce a passenger fare alleged to be excessive, when a complaint to that effect has been filed and the issue thus made has been supported by competent testimony, it has vested in the Commission no affirmative power to require carriers to establish special fares, based upon less than the normal passenger-mile revenue, for the use of passengers on particular occasions or for special

purpose. This was so held in *Cator v. So. Pac. Co.* 6 I.C.C. Rep. 113, and in *Sprigg v. B. & O. R.R. Co.*, 8 I.C.C. Rep. 443, and the question is not to be regarded therefore as open to further discussion. On that ground alone this petition should be dismissed."

Metropolitan Paving Brick Co. v. Ann Arbor R.R. Co., 17 I.C. Rep. 197 (1909):

The Commission found, in complaints against the reasonableness of rates on paving brick, that "there is no transportation reason for making different rates on different grades of fire, building, and paving brick" (p. 205).

At page 204 Chairman Knapp, speaking for the Commission, disposed of one of complainants' contentions as follows:

"... the paving interests suggest a classification limited to paving brick and block for the immediate use of United States, state or municipal governments. So far as the use of paving blocks or brick for the use of the United States, state, or municipal governments is concerned, reference is made to section 22 of the act to regulate commerce which gives the carriers the right to transport traffic for the above-named authorities at reduced rates if they see fit to do so. This can be done notwithstanding the conclusion reached in this case. What carriers may do is one thing and what they ought to be required to do is quite another thing. Certainly the Commission has no power under the law to order carriers to

transport traffic for the United States, state, or municipal governments at reduced rates."

Eschner v. P. R.R. Co., 18 I.C. Rep. 60 (1910):

Complaint that defendants' tariffs are unreasonable and discriminatory in that they prohibit the use of exchange orders in connection with Central Passenger Association interchangeable mileage books as warrants for checking baggage through or securing through sleeping accommodations between points west of Pittsburgh and points east thereof, or *vice versa*.

Commissioner Harlan, speaking for the Commission, said (at pp. 63-64), after quoting from section 22 of the Interstate Commerce Act:

"This language, as will be observed, is altogether permissive and has never been understood as giving the Commission authority to require interstate carriers to sell interstate transportation in that form [mileage, excursion, or commutation tickets]. In *Field v. So. Ry. Co.*, 13 I.C.C. Rep. 298, when that clause was under consideration, we said: [Here follows a quotation from p. 299 of that case.]

"If mileage, excursion, or commutation tickets are voluntarily put on sale by carriers, under tariff authority, that clause in the act means that they are to be exempted from a condemnation that other provisions of the act might require. We think it clear, therefore, that a carrier may not only withhold such special fares from its patrons by omitting to provide for them in its tariffs, but may at its pleasure, at least so long

as no undue discrimination or other violation of the act is involved, attach conditions and restrictions to the use of such special fares. . . . If a carrier may extend or withhold the privilege of mileage, excursion, and commutation tickets, it would seem to follow that it may attach to them, as an integral part of the contract, conditions of the kind involved in this proceeding; and since we can not compel carriers to issue such tickets, we see no grounds upon which we may compel them to modify the conditions which they attach to them, so long, at least, as these conditions result, as heretofore stated, in no discrimination nor in the violation of any other provision of the act."

Dairymen's Supply Co. v. P. R.R. Co., 28 I.C. Rep. 406 (1913):

Complaint alleging undue prejudice and disadvantage because defendants return free of charge property from certain state fairs, but not from the National Dairy Show (or other industrial or trade exhibitions).

The Commission dismissed the complaint, saying, at page 408:

"Section 22 of the act provides:

"That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates . . . to or from fairs and expositions for exposition thereat."

"But, while the act authorizes the free transportation of property for the purposes named, it does not require the carriers to

grant such transportation. It follows that the carriers may grant such transportation or deny it, as they deem best, provided their practices in that respect do not result in unjust discrimination under section 2 or undue preference or prejudice under section 3 of the act.

"Upon the facts of record we are of the opinion that the practice does not result in undue prejudice or disadvantage to this complainant."

United States v. U.P. R.R. Co., 28 I.C. Rep. 518 (1913):

Complaints by the government sought to compel the establishment of certain through routes and joint rates under section 15 of the Interstate Commerce Act.

The Commission, speaking by Chairman Clark, dismissed the complaints. At page 524 one of the government's contentions is disposed of in the following language:

"In so far as the laws administered by this Commission are concerned, the right of carriers to transport government property free or at reduced rates is elective and not mandatory. The carriers may, and frequently do, avail of this right and without tariff authorization, but this Commission is not empowered to require carriers to grant to the United States free transportation or other rates or concessions than those afforded the general public. . . .

"We hold that no preferred parties or special interests, even though pertaining

to the extraordinary functions of government, are entitled to special consideration in the administration of those portions of section 15 of the act here involved, and that the record does not otherwise justify the granting of petitioner's prayers. An order will be entered dismissing the complaints."

Havens & Co. v. C. & N.W. Ry. Co., 20 I.C. Rep. 156 (1911):

Complainant shipped coal for government use in January, 1909. At that time there was no land-grant rate applicable, but one was subsequently published (May, 1909).

Held, complainant was not entitled to the benefit of the reduced rate.

The question turned upon rulings of the Commission, and it was found that under rulings then in force the complainant would have been entitled to the reduced rate if it had been published, but that it was not published till after the making of the shipments in question.

At page 157 the Commission said:

"In February, 1908, the Commission announced the following rulings:

" '33. *Reduced transportation for Federal, state, and municipal governments.*—Under section 22 of the act to regulate commerce, carriers may grant reduced rates for the transportation of property for the United States or for state or municipal governments, under arrangements made directly with such government and in which no contractor or other third person intervenes, without filing or posting the schedule of such rates with the Commission.'

“ ‘36. *Rates on shipments for the Federal Government.*—If title to property, such as postal cards, passes to the Government at the point of manufacture, the carrier may agree upon a rate to be applied for transporting it for the Government to another point, without filing a tariff with the Commission. But if the manufacturer under his contract is required to deliver to the Government at such other point, the transportation must be under the published tariff rate. In other words, if the shipment is made directly by the Government, this rate may be fixed by the carrier without posting and filing the tariff, but not otherwise.’

“In April, 1908, rule 36, above quoted, was superseded by rule 65, reading as follows:

“ ‘65. *Special rates for United States, state, or municipal governments.*—Section 22 of the act authorizes the carriage, storage, or handling of property free or at reduced rates for the United States, state or municipal governments. As has before been decided, such transportation can be granted without the publishing and filing of tariff therefor only in instances where the arrangement is directly between such government and the carrier; but it is considered permissible for carriers to incorporate in their lawful tariffs special rates for the United States, state, or municipal governments applicable only to traffic consigned to such United States, state, or municipal government by name, in care of a recognized officer thereof.’

"In December, 1909, the rule last quoted was rescinded and rule 36 restored in lieu thereof. . . .

"Rule 65 was adopted with the idea that publication of special rates upon traffic consigned to the Government would reduce the price of various materials purchased by it for delivery at designated points by approximately the difference between the regular rate and the lower rate which carriers were willing to accept on Government business. But further consideration of the rule itself, as well as of certain transactions which were possible thereunder, convinced the Commission that restoration of its original rule was necessary to prohibit discriminations which, if not unlawful, were at least contrary to the spirit of the statute. Having reached the conclusion that it is improper to permit the benefit of special rates on Government material to accrue to anyone other than the Government itself, the petition herein must be denied and the complaint will therefore be dismissed."

Cator v. S.P. Co. & U.P. Ry. Co., 6 I.C. Rep. 113 (1893):

The Commission said (pp. 117-120):

"Section 22 of the Act to regulate commerce as amended provides: 'That nothing in this Act shall prevent . . . the issuance of mileage, excursion, or commutation passenger tickets.' To rule in this case that complainant and his associates were subjected to unjust discrimination or undue

prejudice by the issuance of excursion tickets in June and the refusal to issue such tickets for a similar occasion [a political convention] in July, would be a notice to carriers that if they do issue excursion tickets for a given purpose, they lay themselves under obligation to issue them for a similar purpose whenever occasion offers or application is made. Congress intended by the provision in the 22d section to leave the issuance of these tickets free from such restriction. . . .

"The fact remains, however, that as the law stands it gives the Commission no authority to order a carrier to cease and desist from discriminating between bodies of persons traveling at different times for a similar object by establishing a special excursion rate for one occasion and refusing to make any reduction whatever for the other. Whether the law should be amended in this respect is a question for Congress to consider.

"While we are satisfied that there is no authority under the law for an order from the Commission, yet we feel compelled to express our belief that the importance of national conventions for the nomination of candidates for President and Vice President of the United States . . . all point to the conclusion that a proper observance of the spirit of the law to regulate commerce . . . would grant excursion rates to each national convention for such purposes."

Commutation Rate Case, 21 I.C. Rep. 428 (1911):

Complaints by commuters and railroad commissioners that certain newly increased commutation fares of several carriers were unjust and unreasonable.

Held, that some new fares are excessive and unlawful, others not. Commutation traffic stands by itself as a special and distinct kind of service for which a carrier may demand no more than a reasonable compensation.

Speaking through Commissioner Harlan, the Commission said, at pages 437 and 443:

“Nor need we stop to point out the distinction between commutation tickets on the one hand and excursion and mileage tickets on the other. Compared with the normal one-way fare all such tickets may be said to be abnormal. But the resemblance stops at that point. Although they are mentioned together in section 22, the force and effect of that provision must necessarily differ with the differing character of the several kinds of tickets. It seems to be settled under that section that a carrier may enter upon the policy and practice of issuing mileage books and excursion tickets at less than its regular normal fare for the one-way journey, and, having adopted such a policy, may subsequently withdraw from it and refuse longer to issue such tickets. That has been the view of this Commission and is the view generally entertained, although there may be exceptional circumstances where a different conclusion would

be required. It by no means follows, however, that a carrier under section 22 may exercise the same scope and freedom of action with respect to commutation tickets. A carrier that has not undertaken a commutation service may possibly not be compelled to do so under the present law; that question is not before us and is not therefore considered. But having undertaken such a service may it discontinue it at discretion, or, desiring to continue it, may it do so free of control by the Commission with respect to the reasonableness of the compensation that it demands of the commuting public? [Here follows a discussion of the origin and history of commutation traffic and its distinction from other sorts of passenger traffic—pp. 438 to 443.] . . .

“ . . . we see no reason why the reasonableness of the fares demanded for the service may not be looked into by the Commission under section 1. It is conceded on behalf of the principal complainant that a carrier may not be compelled, under the present law, to undertake a commutation service and to establish commutation rates. That is probably true. But having undertaken a definite and regular commutation service, such as is shown of record on the part of each of the defendants in this proceeding, the power as well as the duty of the Commission under section 1 to examine into the reasonableness of the charges exacted, when complaint has been made, seems to be beyond question. Reading section 22 in the light of the special nature and character of

commutation traffic and service, the utmost that reasonably may be said of it, as applied to commutation tickets, is that it constitutes a statutory recognition of the fact that commutation is a different kind of traffic and therefore is not to be compared with any other kind of passenger traffic."

United States v. A. & V. Ry. Co., 40 I.C. Rep. 405 (1916):

Complaints by Post Office Department that rates on post cards, stamped envelopes, etc., were unjust and unreasonable. Complainant asked the Commission to establish rates equivalent to third- or fifth-class freight rates.

Prior to 1912 the rates on these articles were arranged between the individual carriers and the government. They ranged from fourth to first class. Since then the defendants had charged substantially first-class rates without land-grant deductions.

No rates were published on these articles by any of the defendants, and only the southern carriers provided a rating for them.

The Commission said (p. 406):

"Defendants challenged our power to require the establishment of ratings, on the ground that they are not 'common carriers' of government stamped articles, but are essentially private carriers under special contracts. They have been and are, however, ready and willing to transport these articles for the government at rates satisfactory to them, and we are not asked to prescribe ratings for the benefit of the general public.

Under the circumstances we think we have authority to prescribe reasonable ratings for the traffic in question, although, under section 22 of the act, the carrier and the government may agree upon some other rate. Conference Ruling 26. The tariff rate or classification rating is the maximum which the carriers may demand from the government. Conference Ruling 218."

And at page 407:

"Southern classification provides for the acceptance of postal cards, envelopes, and newspaper wrappers, stamped, at first-class rates when shipped for the account of the government on government bills of lading, in cars protected by government locks and seals, minimum weight 30,000 pounds. Defendants are willing to accept the same articles for the government at first-class rates, in substance and effect conforming to the provisions of the southern classification rating. We find that the southern classification rating is just and reasonable, and for the future will be a reasonable maximum rating in official and western classification territories also."

APPENDIX D.

CONFERENCE RULINGS OF THE COMMISSION DEALING WITH SECTION 22 ARE THE FOLLOWING (SEE CONFERENCE RULINGS ISSUED NOVEMBER 1, 1917):

“33. *Reduced rate transportation for federal, state, and municipal governments.*—

Under section 22 of the act to regulate commerce, carriers may grant reduced rates for the transportation of property for the United States or for state or municipal governments, under arrangements made directly with such government and in which no contractor or other third person intervenes, without filing or posting the schedule of such rates with the Commission. (See rulings 36, 208e, 218, 244, 311, and 452.)”

“36. *Rates on shipments for the federal government.*—If title to property, such as postal cards, passes to the government at the point of manufacture, the carrier may agree upon a rate to be applied for transporting it for the government to another point, without filing a tariff with the Commission. But if the manufacturer under his contract is required to deliver to the government at such other point, the transportation must be under the published tariff rate. In other words, if the shipment is made directly by the government, this rate may be fixed by the carrier without posting and filing the tariff, but not otherwise. (See ruling 33, and ruling 244 rescinding ruling 65; also see ruling 452; also *United States v. A. & V. Ry. Co.*, 40 I.C.C., 406.)”

"65. *Special rates for United States, state, or municipal governments.*—(Overruled and withdrawn by ruling 244; also see ruling 208e.)"

"107. *Reduced fares for the deportation of Chinese not permissible.*—Special fares can not lawfully be accorded by carriers for the transportation of Chinese to the ports for deportation, even though the expense is paid by the government.

"Provisions for the subsistence and care in transit of Chinese being deported are matters of contract between the carrier and the government, and need not be published in the tariffs."

"208. *Free passes and free transportation.*—(e) Section 22 of the act authorizes carriers to grant free or reduced-rate transportation of property for the United States, state, or municipal governments, or for charitable purposes or for exhibition at fairs or expositions. It also authorizes free or reduced-fare transportation of certain specified persons. This special provision and the words "reduced rates" are construed to be special authority for carriers to depart from established tariff rates or fares; and for such transportation as is provided for in said section 22 it is not necessary for carriers to provide tariffs or observe tariff rates or fares and regulations excepting in the issuance, sale, and use of mileage, excursion, or commutation passenger tickets, and joint interchangeable

mileage tickets. As to these, the provisions of section 6 with regard to publishing, filing, posting, and observing tariffs must be complied with. (See rulings 33, 36, 65, 218, 244, 297, and 311; compare ruling 107.)”

“218. *Transportation of federal troops.*—The Commission is of the opinion that carriers, either by contract or bid or other arrangement with the War Department, may lawfully make special rates or fares for the movement of federal troops, when moved under orders and at the expense of the United States government, and that the rates or fares so made need not be posted or filed with the Commission. (See rulings 33 and 208e.)

“The lawfully published rates or fares for the transportation of the general public, in the opinion of the Commission, are to be regarded, however, as the maximum rates and fares that may lawfully be charged the government for the movement of federal troops. (See *United States v. A. & V. Ry. Co.*, 40 I.C.C., 406.)

“This ruling also governs similar transportation for the naval and marine services. (Ruling does not apply to state or territorial troops; see ruling 297.)”

“244. *Reduced rates on property for the United States or municipal governments.*—Rule 61 of Tariff Circular 17-A and Conference Ruling 65 are hereby withdrawn and the previous ruling of February 4, 1908, reported as Conference Ruling 36, is restored. (See rulings 208e and 311.)”

“297. *Free and reduced rate transportation of persons traveling at the expense of state or territorial governments.*—Conference Ruling 218 is confined to movements at the instance and expense of the United States. The Commission finds nothing in the law authorizing free or reduced rate transportation of persons, other than indigents, traveling at the expense of a state or territorial government. (See rulings 208e and 452.)”

“311. *Free transportation of property for county authorities.*—(Restated in ruling 452.)”

“452. *Free transportation of property for townships and counties.*—Upon inquiry: *Held*, That townships and counties are municipalities within the meaning of section 22 of the act to regulate commerce and carriers may lawfully transport their property free or at reduced rates. (See rulings 33, 36, 244, and 297.)”

Note: Conference Rulings 65 and 311 originally read as follows:

“65. *Special rates for United States, state, or municipal governments.*—Section 22 of the act authorizes the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments. As has before been decided, such transportation can be granted without the publishing and filing of a tariff therefor only in instances where the arrangement is directly between such government and the

carrier; but it is considered permissible for carriers to incorporate in their lawful tariffs special rates for the United States, State or municipal governments applicable only to traffic consigned to such United States, State, or municipal governments by name in case of a recognized officer thereof. (Overruled and withdrawn by the Commission. See Ruling 244; see also Rulings 36 and 311.)”

[See *Havens v. C. & N.W. Ry. Co.*, 20 I.C.C. 156, 158.]

“311. *Free transportation of property for county authorities.*—Upon inquiry, *Held That* under section 22 interstate lines may carry free or at reduced rates for county authorities. (See Rulings 33, 65, 208e, 244, & 297.)”

The Conference Ruling Bulletin of November 1, 1917, contains an explanatory note reading in part as follows:

“The rulings of the Commission in conference are announced informally from time to time through the public press and are later edited and issued in this form for the information of shippers, carriers, and others interested in transportation matters. The rulings express the views of the Commission on informal inquiries involving special facts or requiring an interpretation and construction of the law, and are to be regarded as precedents governing similar cases.”

APPENDIX E.

THE ACT TO REGULATE COMMERCE, SECTIONS 1 (4), 1 (5), 1 (7), 2, 3 (1), 3 (3), 6 (7), 8, 10 (1), 13 (1), 13 (2), 15 (1), 15a (2), 15a (3), 22 (1), 22 (2), 22 (3):

SEC. 1. (4) It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property or in the transmission of intelligence by wire or wireless as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *Provided*, That messages by wire or wireless subject to the provisions of this Act may be classified into day, night, repeated, unrepeatd, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged

for the different classes of messages: *And provided further*, That nothing in this Act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.

(7) No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge; to necessary caretakers of live stock, poultry, milk, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, custom inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested,

persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation: *And provided further*, That this provision shall not be construed to prohibit the privilege of passes or franks, or the exchange thereof with each other, for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines, and the officers, agents, employees and their families of other common carriers subject to the provisions of this Act: *Provided further*, That the term "employees" as used in this paragraph shall include furloughed, pensioned, and superannuated employees, persons who have become disabled or infirm in the service of any such common carrier, and the remains of a person killed in the employment of a carrier and ex-employees traveling for the purpose of entering the service of any such common carrier; and the term "families" as used in this paragraph shall include the families of those persons named in this proviso, also the families of persons killed, and the widows during widowhood and minor children during minority of persons who died, while in the service of any such common carrier. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two

thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof.

SEC. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any

particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

(3) All carriers, engaged in the transportation of passengers or property, subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.

SEC. 6. (7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SEC. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

SEC. 10. (1) That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United

States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

SEC. 13. (1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified,

or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

SEC. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Com-

mission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this Act for the transportation of persons or property or for the transmission of messages as defined in the first section of this Act, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged (or, in the case of a through route where one of the carriers is a water line, the maximum rates, fares, and charges applicable thereto), and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may

be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 15a (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning

March 1, 1920, the Commission shall take as such fair return a sum equal to $5\frac{1}{2}$ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

SEC. 22. (1) That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and exhibitions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees;

and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this Act: *Provided further*, That nothing in this Act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this Act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this Act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mile-

age tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this Act shall apply to any violation of the requirements of this proviso.

(2) Commission is directed to require, after notice and hearing, each carrier by rail, subject to this Act, to issue at such offices as may be prescribed by the commission interchangeable mileage or scrip coupon tickets at just and reasonable rates, good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The commission may in its discretion exempt from the provisions of this amendatory Act either in whole or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made. Such tickets may be required to be issued in such denominations as the commission may prescribe. Before making any order requiring the issuance of any such tickets the commission shall make and publish such reasonable rules and regulations for their issuance and use as in its judgment the public interest demands; and especially it shall prescribe whether such tickets are transferable or non-transferable, and if the latter, what identification may be required; and especially, also to what baggage privileges the lawful holders of such tickets are entitled.

(3) Any carrier which, through the act of any agent or employee, willfully refuses to issue or accept any such ticket demanded or presented under the lawful requirements of this Act, or willfully refuses to conform to the rules and

regulations lawfully made and published by the commission hereunder, or any person who shall willfully offer for sale or carriage any such ticket contrary to the said rules and regulations shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not to exceed \$1,000.

APPENDIX F.

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*Exhibit 50 was prepared and submitted by the Commission itself—not the carriers (Rec. p 160).

Subject	References are to pages of the Record.	
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THE INTERCHANGEABLE MILEAGE TICKET CASE.

No. _____

469

Office Supreme Court, U. S.

FILED

SEP 21 1923

WM. H. STANSBURY

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

UNITED STATES OF AMERICA, et al.,

Appellants,

v.

NEW YORK CENTRAL RAILROAD COMPANY, et al.,

Appellees.

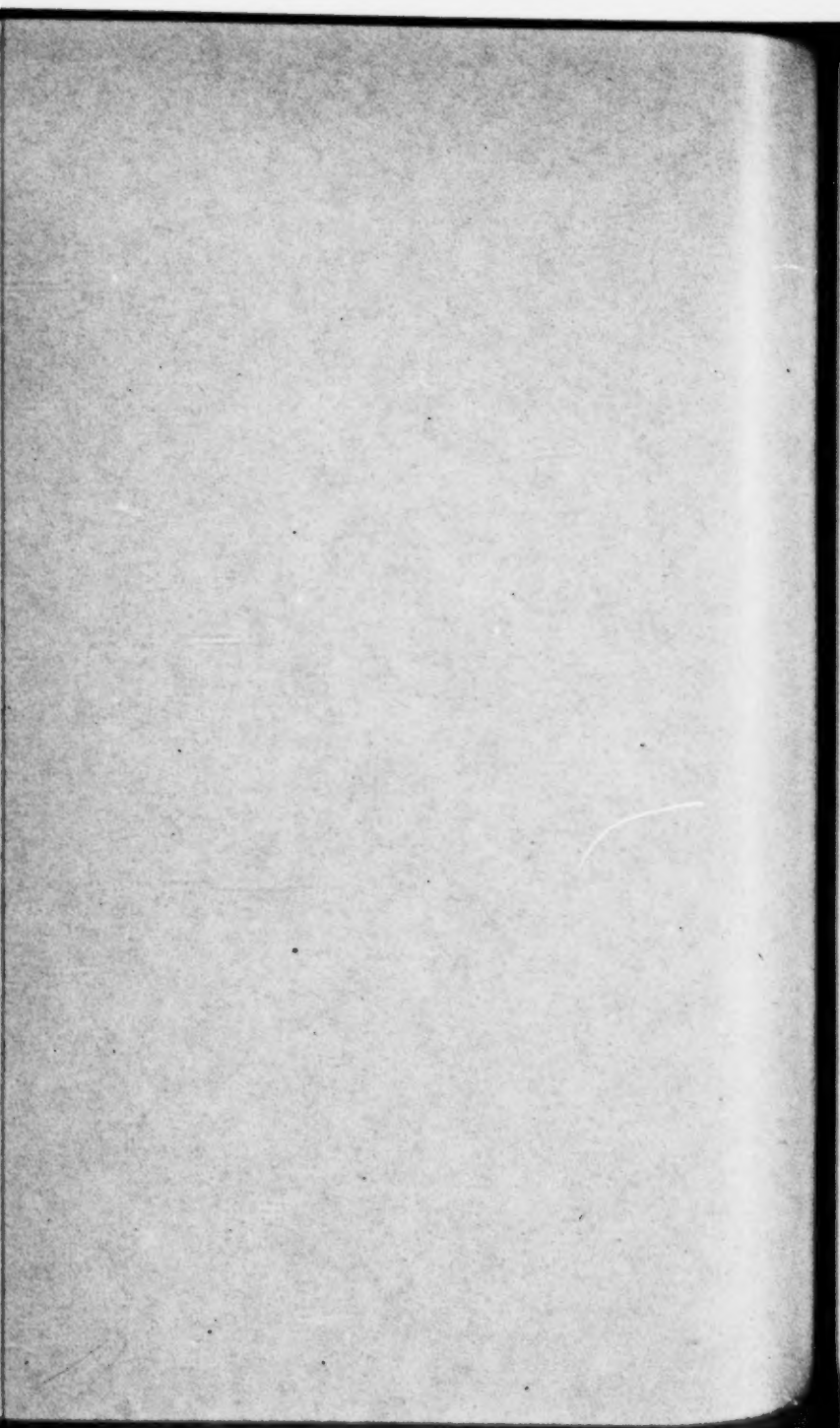
APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MASSACHUSETTS.

MOTION FOR LEAVE TO FILE BRIEF AND MAKE ORAL ARGUMENT ON BEHALF OF THE INTERNATIONAL FEDERATION OF COMMERCIAL TRAVELERS ORGANIZATIONS, AS *AMICUS CURIAE*.

CLIFFORD THORNE,

JAMES W. GOOD,

Of Counsel.



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

No.

UNITED STATES OF AMERICA, et al.,
Appellants,

v.

NEW YORK CENTRAL RAILROAD COMPANY, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES, FOR THE DISTRICT OF MASSACHUSETTS.

MOTION FOR LEAVE TO FILE BRIEF AND MAKE ORAL
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ERATION OF COMMERCIAL TRAVELERS ORGANIZA-
TIONS, AS *AMICUS CURIAE*.

*To the Honorable Judges of the Supreme Court
of the United States:*

Now COMES the International Federation of Commer-
cial Travelers Organizations (hereinafter called the peti-
tioner), a voluntary unincorporated association, and re-
spectfully asks leave as *amicus curiae* to file a brief, and
through its solicitors to make an oral argument herein
opposed to the positions taken by appellees, and in sup-
port of the positions taken by the appellants relative to
the construction and application of provisions of the In-
terstate Commerce Act, especially Section 22 thereof;

also in opposition to certain positions taken by appellees upon the construction and application of the Fifth and Fourteenth Amendments to the Constitution of the United States. This motion is made under the provisions of: the Interstate Commerce Act; the Act of October 22, 1913, entitled: "An Act Making Appropriations to Supply Urgent Deficiencies in Appropriations for the Fiscal Year 1913, and for Other Purposes;" also the provisions of the federal statutes applicable thereto and governing the general equity jurisdiction of this court.

Appellees seek to have affirmed the finding of the District Court of the United States for the District of Massachusetts, in Equity No. 1808, dated April 23, 1923, enjoining and restraining the enforcement of an order of the Interstate Commerce Commission relative to the establishment of non-transferable interchangeable scrip coupon tickets in a proceeding entitled, "Interchangeable Mileage Ticket Investigation," Docket No. 14104.

Parties submitting this application were and are interested in the controversy before the Interstate Commerce Commission to which the aforesaid order refers, which is the subject-matter of this suit, and were and are deeply interested in the pending case involving the validity of the order made by the said Commission in said proceeding, all of which is more particularly set forth in the statement attached hereto.

CLIFFORD THORNE,

JAMES W. GOOD,

*Solicitors for the International Federation
of Commercial Travelers Organizations.*

In support of this motion, your petitioner respectfully alleges that it represents large interests profoundly concerned in the subject-matter of this proceeding.

Your petitioner, the International Federation of Commercial Travelers Organizations, has its general offices in the City of Chicago, County of Cook, State of Illinois, and is composed of fourteen (14) members, consisting of associations having an aggregate membership of more than 700,000 traveling men throughout all portions of the United States, said associations with their membership as of December 31, 1922, being as follows:

Western Travelers Accident Association (general office, Omaha, Nebraska)	7,900
Iowa State Traveling Men's Association (general office, Des Moines, Iowa).....	67,400
Travelers' Protective Association (general office, St. Louis, Mo.).....	102,000
Illinois Commercial Men's Association (general office, Chicago, Ill.).....	165,000
Commercial Travelers Mutual Accident Association (general office, Utica, N. Y.).....	170,000
Indiana Travelers Accident Association (general office, Indianapolis, Ind.).....	5,700
United Commercial Travelers of America (general office, Columbus, Ohio).....	105,900
Connecticut Commercial Travelers Mutual Accident Association (general office, New Haven, Conn.)	7,000
Commercial Travelers Eastern Accident Association (general office, Boston, Mass.).....	9,900
Minnesota Commercial Men's Association (general office, Minneapolis, Minn.).....	17,400

Illinois Traveling Men's Health Association (general office, Chicago, Ill.).....	59,300
Commercial Travelers' Boston Benefit Association (general offices, Boston, Mass.).....	5,700
Northwestern Traveling Men's Association, (general office, Chicago, Ill.).....	500
National Shoe Travelers Association, Boston, Mass.	2,500

All of the above named federated bodies are incorporated under the laws of the states in which their general offices are located.

Your petitioner further alleges that it took a leading part in the hearings before congressional committees relative to the enactment of the legislation under which the order at issue was entered by the Interstate Commerce Commission, the same being an amendment to Section 22 of the Interstate Commerce Act, directing the Interstate Commerce Commission to require the issuance of interchangeable scrip coupon or mileage tickets on railroads, and for other purposes. Your petitioner was represented by its officials in all public hearings before the committees of the Senate and of the House of Representatives of the United States while said measure was pending.

Your petitioner also participated in all hearings before the Interstate Commerce Commission in the proceeding entitled, "Interchangeable Mileage Ticket Investigation," Docket 14104, which resulted in the order made by the Interstate Commerce Commission at issue in this proceeding.

The organization of traveling men which appeared by

counsel in the lower court, having its principal membership within the State of New York, is not associated in any manner with the undersigned. The International Federation of Commercial Travelers Organizations has a membership in every state of the nation, has been in active operation for more than twenty-three (23) years, and is the recognized national body of traveling men of the United States.

It is of vital importance to your petitioner, and to American industry as a whole, that the order of the Interstate Commerce Commission at issue shall be sustained and not overthrown by this court.

Questions of public policy for the welfare of the community have been decided by Congress and by the Commission, and the decision of the lower court is an unwarranted invasion of the province of another branch of the government. In the entire history of the organization of the traveling men of the United States, no more important proceeding affecting them directly has ever been tried before any court or tribunal than the one at bar. Unfortunately we were represented only by our president at the preliminary hearing on the application for a temporary injunction before the lower court. But, by agreement of other parties there represented by counsel, the preliminary hearing for a temporary injunction was transformed into the final hearing on the permanent injunction, thereby depriving the International Federation of Commercial Travelers Organizations from participating in the trial, as it had fully intended and had made preparations to do. We sincerely desire to be heard on these issues of such moment to our activities, and of such concern to the industrial welfare of the whole people.

WHEREFORE, the undersigned respectfully ask leave of this court to file a brief and make an oral argument herein on behalf of the aforesaid petitioner, as *Amicus Curiae*.

Respectfully submitted,

CLIFFORD THORNE,

JAMES W. GOOD,

*Solicitors for the International Federation
of Commercial Travelers Organizations.*

Dated at Chicago, Illinois, this 5th day of September, 1923.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

D. K. CLINK, being duly sworn, deposes and says that he is Secretary-Treasurer of the International Federation of Commercial Travelers Organizations, the applicant described as the petitioner herein; that he has read the foregoing motion and supporting statement, and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

..... *D. K. Clink*

Subscribed and sworn to before me by the said D. K. Clink, this *14* day of *Sept*, A. D. 1923.

(*Seal*) *W. M. Hartman*

Notary Public.

THE INTERCHANGEABLE MILEAGE TICKET CASE.

No. 469.

Office Supreme Court, U. S.

FILED

JAN 9 1924

WM. R. STANSBURY

CLERK

IN THE

Supreme Court of the United States

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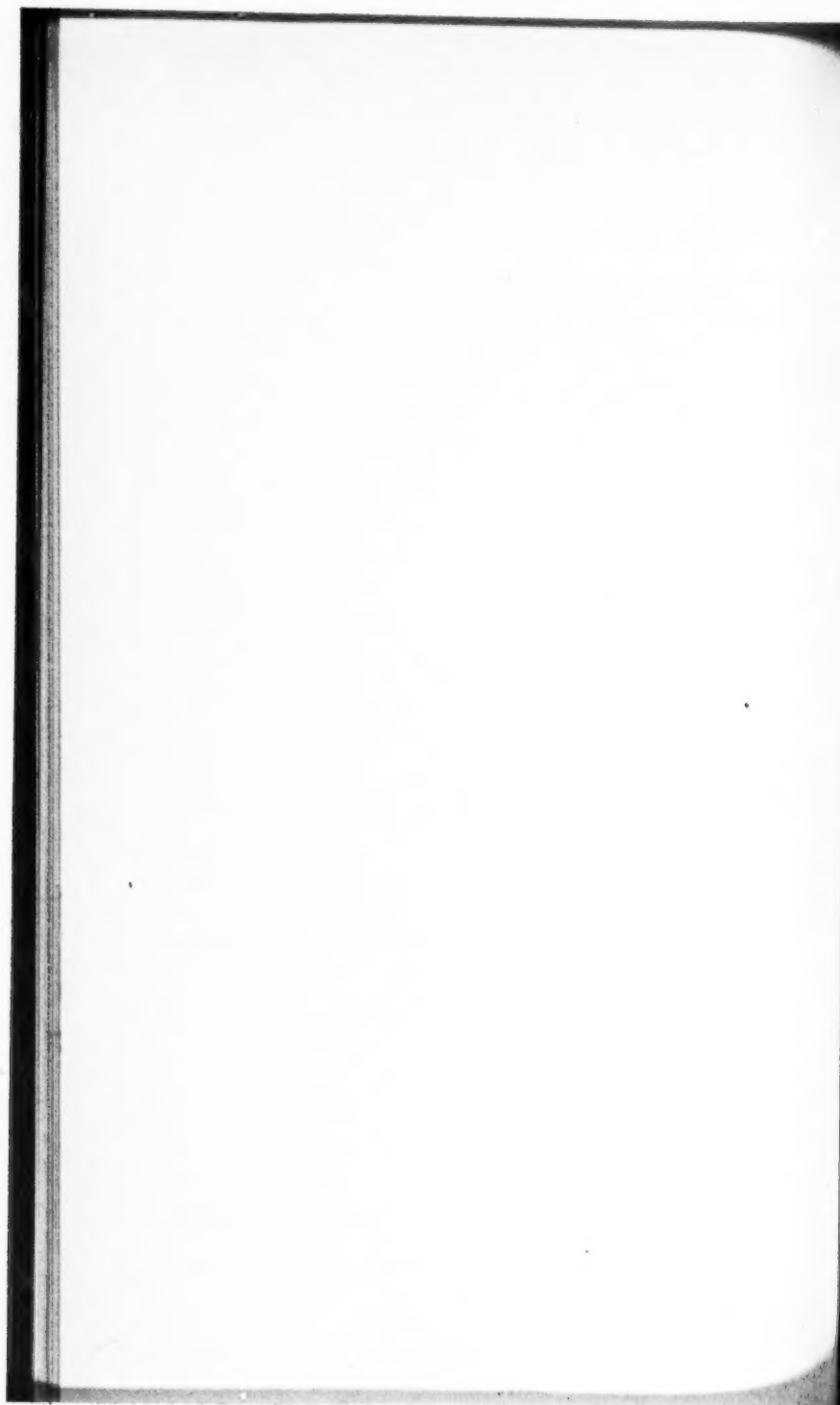
UNITED STATES OF AMERICA, et al.,
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Appellees.

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BRIEF ON BEHALF OF THE INTERNATIONAL FEDERATION
OF COMMERCIAL TRAVELERS ORGANIZATIONS,
AS AMICUS CURIAE.

CLIFFORD THORNE,
JAMES W. GOOD,
Of Counsel.



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ABBREVIATIONS:

FOR CONVENIENCE WE USE "COMMISSION'S DECISION" TO REFER TO THE DECISION OF THE INTERSTATE COMMERCE COMMISSION IN THE PROCEEDING ENTITLED *INTERCHANGEABLE MILEAGE TICKET INVESTIGATION*, DOCKET 14104, 77 I. C. C. 200, AT ISSUE IN THIS PROCEEDING.

"CARRIER'S BRIEF" REFERS TO THE BRIEF FILED IN THE DISTRICT COURT OF THE U. S. FOR THE DISTRICT OF MASSACHUSETTS IN *N. Y. C. ET AL. v. U. S.*, IN EQUITY 1808. BY COUNSEL FOR THE NEW YORK CENTRAL, ET AL., TIONERS BELOW.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

No. 469.

UNITED STATES OF AMERICA, et al.,
Appellants,
v.

NEW YORK CENTRAL RAILROAD COMPANY, et al.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES, FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF ON BEHALF OF THE INTERNATIONAL FEDERATION
OF COMMERCIAL TRAVELERS ORGANIZATIONS
AS *AMICUS CURIAE*.

STATEMENT OF THE CASE.

INTRODUCTION.

The power of Congress, and of the Interstate Commerce Commission, to prescribe lower passenger fares than those applicable to ordinary one trip tickets when a party purchases transportation aggregating 2,500 miles is, in substance, the chief issue in this proceeding. To what extent does the Government have jurisdiction over the passenger traffic of the country?

This case involves the validity of an order by the Interstate Commerce Commission directing the sale of

non-transferrable interchangeable scrip coupon books for passenger travel in the denomination of \$90 at a reduction of 20 per cent below the face value of the said tickets, good for one year from date of purchase. Interchangeable Mileage Ticket Investigation, Docket 14104, 77 I. C. C. 200,647, hereafter referred to as: Commission's decision.

The Commission's order was dated March 6, 1923, and was made pursuant to the recent amendment of Section 22 of the Interstate Commerce Act. A permanent injunction against the enforcement of this order was granted April 23, 1923, by the District Court of the United States for the District of Massachusetts. *New York C. R. Co. et al. v. U. S.*, 288 Fed. 951.

The organization filing this brief has an aggregate membership at the present time of approximately seven hundred thousand commercial traveling men throughout the United States, and these members are vitally concerned in the outcome of the pending litigation.

In freight traffic, for many years, practically all of us have recognized the propriety of adjusting rates on different commodities or on the same commodity, in accordance with the circumstances and conditions surrounding the traffic.

Some persons have insisted on the postage stamp basis of making charges for both passenger and freight traffic, making them uniform for all people regardless of varying conditions. The general consensus of opinion has been that such a theory is impracticable, and a schedule of rates so adjusted could not possibly meet the needs of the public. A flat maximum rate per ton mile throughout the United States, for all hauls, and for all commodities, regardless of conditions, is an unheard of thing,

and would meet with universal disapproval. And yet that is the basic principle that counsel for the railroads in this case desire to force upon Congress and the Interstate Commerce Commission, so far as their activities are concerned in the passenger traffic of the United States. They base their claim on *dicta* contained in *Lake Shore & Michigan Southern Railway Company v. Smith*, 173 U. S. 684, hereinafter generally referred to as the Lake Shore case, and certain decisions by state courts which have followed that as a controlling precedent.

As to freight traffic the Commission for many years had no power to fix maximum rates. It was held that the Commission could recommend, but that the power to fix rates would constitute an unwarranted interference with the managerial activities of a private corporation; and Congress declined to grant such powers to the Commission for more than seventeen years after its creation. Ultimately, however, it was felt that the railroad industry, rapidly organizing into a single compact body, was exercising a public function of such large importance to the community, with the power to wreck or build up enterprises and towns and cities, that it was wise to have a disinterested tribunal with adequate power to require the establishment of reasonable, just, and non-discriminatory freight rates.

Other powers to make orders affecting safety appliances, issues of stocks and bonds, etc., have been added from year to year.

In this development, lasting more than a generation, it is a noteworthy fact, cited by counsel for the Government before the lower court, that no part of the Interstate Commerce Act, or any amendment thereof, has ever been held to be unconstitutional.

In each advance step taken, as Congress has added this power or that one, it has always met with determined resistance on the part of the railroads as an unwarranted invasion of their private domain.

Discriminations in charges between persons and localities have constituted one of the chief causes for the creation of the Interstate Commerce Commission, a tribunal which has rapidly assumed a position of commanding importance in our commercial life.

It was early recognized by the Commission, as well as by the Courts, that the Commission must exercise its powers in regard to freight traffic with full recognition of the varying conditions surrounding the traffic. A uniform ton mile rate has never been known in the industry. Freight rates rightly vary with the distance, density of traffic, character of commodity, etc., and when the Commission has failed to consider the conditions surrounding the traffic the courts have very promptly acted to correct the situation. A mere comparison of rates without the consideration of the attendant circumstances, is of no consequence in a freight rate case, for it ignores the fundamental clause of the entire law requiring equality of charge for similar services under substantially similar circumstances and conditions.

The same principle has been slower of recognition as applied to passenger traffic, and some grievous errors, consequently, have been made. Both the Supreme Court and the Commission have been compelled to modify their former conclusions, if not to reverse themselves. (*The Lake Shore case, supra*, and *Penn. R. Co., etc. v. Towers, et al.* 245 U. S. 6; *Sprigg et al. v. B. & O., et al* 8 I. C. C. 443, and the *Commutation Rate Case*, 21 I. C. C. 428; *Re Passenger Tariffs*, 2 I. C. Rep. 445; *P. C. C. & St. L. R.*

Co. v. B. & O. R. Co., 2 I. C. Rep. 729, and *In the Matter of Party Rate Tickets*, 12 I. C. C. 96.) This is a natural development, for passenger traffic does not present the wide variation of freight traffic as to weight, bulk and value. However, as time has passed on we have gradually learned that there are important basic differences in the conditions surrounding passenger traffic, which must be recognized if justice and the best interests of the community shall prevail. It is utterly idle and superficial to prate about the passengers riding in the same cars, in the same train, and on the same road bed. The same is true as to freight traffic, and yet freight charges vary in accordance with the conditions. The differences in conditions are not of the same character in the passenger traffic as in the freight traffic; and that has been the principal source of confusion in our thought as to these problems.

In their zeal to have absolute equality regardless of conditions, there were some at first who claimed the railroads had no right to prescribe different charges per passenger mile under different circumstances, although the best interests of the public and the fair recognition of the rights between individuals dictated that there should be such a variation to meet conditions. The railroads were the chief advocates this time, and they finally succeeded in compelling the proper recognition of this proposition. Then it was claimed—just as occurred originally relative to freight traffic—that while the railroads could make these distinctions, the Government had no right to do so. This time the railroads were on the other side. And today we are witnessing an exhibition of their championing this impossible doctrine. We are told that the Government can fix only one uniform fare for passenger traffic, the same charge for each mile a pas-

senger may travel throughout the United States, and then its task is completed; it must keep hands off unless it wants to make a horizontal increase or decrease in that single rate. We are informed that the Government in dealing with passenger matters must be blind to varying circumstances and conditions. All that must be reserved to the superior wisdom of our railroad friends, and the Government must exercise no jurisdiction, we are told, over the different classes of passenger traffic.

The very statement of the proposition would seem to demonstrate its absurdity, without the need of argument. But we must carefully go through the record before us in order to demonstrate that there are genuine differences in conditions surrounding passenger traffic, that the railroads themselves have recognized this for a half century, that there is no so-called single uniform passenger fare which has been established by the Government throughout the nation thereby foreclosing further action on the part of the Government. And we must further consider the character of the investigation and of the order made by the Commission, to see if there was a mistake of law; and then an analysis of the facts is necessary to test the soundness of the claim of confiscation advanced by the carriers in this proceeding.

• • •

Prior to August 18, 1922, Section 22 of the Interstate Commerce Act contained certain permissive provisions authorizing carriers to issue mileage, excursion and commutation passenger tickets; but there was no affirmative grant of power to the Commission in this section.

The following amendment of Section 22 was approved August 18, 1922:

"(2) The Commission is directed to require, after notice and hearing, each carrier by rail, subject to this Act, to issue at such offices as may be prescribed by the Commission interchangeable mileage or scrip coupon tickets at just and reasonable rates good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The Commission may in its discretion exempt from the provisions of this amendatory Act either in whole or in part any carrier where the particular circumstances shown to the Commission shall justify such exemption to be made. Such tickets may be required to be issued in such denominations as the Commission may prescribe. Before making any order requiring the issuance of any such tickets the Commission shall make and publish such reasonable rules and regulations for their issuance and use as in its judgment the public interest demands; and especially it shall prescribe whether such tickets are transferable or non-transferable, and if the latter, what identification may be required; and especially, also to what baggage privileges the lawful holders of such tickets are entitled."

PROCEDURE BEFORE THE COMMISSION.

Due process of law contemplates, among other things, an orderly procedure in the determination of litigated matters. After the enactment of the foregoing amendment to Section 22 of the Act, the Commission issued a notice calling for a hearing in which the following questions were proposed as subjects to be considered:

"1. Shall both interchangeable mileage and scrip-coupon tickets be issued and sold? (2) What rate or rates shall be established as just and reasonable for each or either form of ticket? (3) What conditions, if any, should be attached to the issuance and sale of such tickets by reason of the existence of different levels of passenger rates in different sections of the country? (4) In what denominations shall the ticket or tickets be issued? (5) In general, at what offices of carriers shall the tickets to be prescribed be available to the public? (6) What rules and regulations for the issuance and use of these tickets shall be required? (7) Shall the tickets be transferable or non-transferable? (8) If non-transferable, what identification may be required? (9) To what baggage privileges shall the lawful holders of such tickets be entitled?" (Petition, pp. 36-37.)

The order of investigation also called for a statement from those desiring exemption from the order. This notice was issued August 23, 1922, and the date of hearing was fixed as September 26, 1922. The hearing was conducted before Chairman Meyer of the Interstate Commerce Commission at Washington, D. C., and was participated in by the representative railroad organizations of all regions in the United States, and by many large organizations of commercial traveling men and shippers. The case was submitted November 15, 1922. A decision was rendered and issued January 26, 1923, fixing March 15, 1923, as the effective date of the order when the carriers should establish the fares prescribed. In the meantime another hearing was conducted as to the rules and regulations to be prescribed as required by the Act. The hearing was closed February 23, 1923. On March 6, 1923, a supplemental report was issued presenting the rules and regulations which had been approved.

All the essential steps were taken which are necessary under the orderly procedure of the Commission; and no parties make claim, to our knowledge, that they were denied a full hearing.

INJUNCTION PROCEEDINGS.

A petition was filed March 30, 1923, in the Federal Court for the District of Massachusetts, by the carriers earning in 1922 88.23 per cent of the passenger revenues of all Class I railroads in the Eastern Group (as classified by the Interstate Commerce Commission), seeking to enjoin the enforcement of the order of the Commission establishing these "scrip book" regulations providing for the issuance of interchangeable scrip coupon tickets. Hearing was had and an opinion was rendered April 23, 1923, and the final decree was issued May 15, 1923, ordering a permanent injunction against the enforcement of the Commission's order.

The evidence offered before the lower court included the following:

1. The record before the Interstate Commerce Commission in the proceeding entitled, Interchangeable Mileage Book Investigation, No. 14104.
2. Two short affidavits by Julius H. Parmelee stating the total income and expenses from all sources, without separation as between freight and passenger traffic; also the gross revenues from passenger traffic without any statement as to expenses of the passenger traffic, and without any statement of the value of the property devoted to passenger traffic; also the tentative findings concerning the value of railroad property in the United States, as made by the Interstate Commerce Commission in 1920, with subsequent additions of property.

The Parmelee affidavits show that 98.39 per cent of the total net railway operating income of all railroads in the Eastern Group was earned by Class I railroads.

3. One affidavit by Samuel Blumberg on behalf of the National Council of Traveling Salesmen's Associations, and Garment Salesmen's Association, Incorporated describing the character of these organizations and the manner in which they are concerned in the matter under consideration.

Some of the significant facts contained in the record before the Interstate Commerce Commission and in the decision of the Commission are as follows:

The passengers per train, per car, and the total passenger miles over a period of years, are shown in the following table:

Calendar year	Passengers per train	Passengers per car	Revenue Passenger- miles
1916.....	56	16	34,586,000,000
1917.....	65	17	39,477,000,000
1918.....	76	20	42,677,000,000
1919.....	82	21	46,358,000,000
1920.....	80	20	46,849,000,000
1921.....	67	16	37,329,000,000
1921 (first six mos.)	66	16	18,382,000,000
1922 (first six mos.)	60	15	16,487,000,000

(Commission's decision, page 203.)

The total passenger revenue in the United States for the first six months in 1922 aggregated approximately \$500,000,000 (being stated in a dissenting opinion by Commissioner Daniels at page 219).

The carriers estimated the total passenger revenues for the year 1922 in the United States to be approxi-

mately \$1,000,000,000; 30 per cent of which, or \$300,000,000, will be affected, according to their claim, by the order of the Commission in this proceeding. (See Carriers' Brief before the Lower Court, p. 85.) The carriers claim that the 20 per cent reduction ordered by the Commission will involve \$60,000,000. (See same page of said Brief; also see Appendix A, following Commission's decision at page 221 of the same.) The figures for the nation were used by the carriers to which certain percentages were applied to secure an estimate of the corresponding figures for the carriers involved in this case.

The carriers claim that the additional expense of accounting and policing the use of the scrip books for Class I carriers in the United States will be approximately \$1,680,000 per annum. Commission's Decision, 208

A digest of the record before the Commission as to the reductions in effect in the mileage books which were abolished by the Railroad Administration in 1918, together with a statement as to the amount the said mileage books were used, is contained in the following extracts from the brief filed on behalf of all carriers before the Interstate Commerce Commission in the investigation aforesaid, Docket 14104:

"When the mileage books were abolished by the Railroad Administration, they were being sold at reductions below the normal fare, ranging around 10 per cent, 16 $\frac{1}{2}$ per cent and 20 per cent. Thus Mr. Fox states (385-386) that the discounts prior to Federal Control were as follows:

'In New England, 10 per cent;

In Central and Trunk Line Passenger Association territories, 10 per cent;

In Southeastern Territory, 20 per cent; but in this connection it must be remembered, as stated above.

that the Commission had authorized an increase in the charge for the mileage book from 2 cents to 2½ cents per mile, so that this would have become a discount of only 10 per cent but for the action of the Administration in withdrawing the mileage books entirely and reducing the discount to nothing;

In Southwestern Territory, 16½ per cent;

In the Central West, when the 2 cent rate was effective throughout the country, there was no reduction on the part of any line from the basic intrastate fares by the use of mileage, and a very considerable portion of the revenue of the carriers derived from intrastate traffic in those States. (386).'' Carriers' brief before the Commission in Docket 14104, pp. 14-15.

“The use of the old mileage books cannot be accurately stated because of the different conditions in different sections of the country. . . At page 29, Mr. Fox said that some years ago about an average of not less than 20 per cent of the total passenger revenue in certain sections of the country was derived from mileage tickets; that, in fact, on some lines as high as 60 per cent of the total passenger traffic was so moved; and, in the first of these instances, the use of the mileage tickets represented this percentage of travel, although they were restricted to smaller territorial limits and were not interchangeable as between all lines in the territory (29). He also pointed out that in other sections the percentage would not run as high (31-32). Mr. Rose, the accounting witness on behalf of the carriers, stated that, during the period when interchangeable mileage books were used, the use in the territory to which he referred (*i. e.*, Southeastern territory) was approximately 20 per cent (91). See also the testimony of Mr. Fox at page 107 and of Mr. Rose, at pages 220-221.

The scrip book currently in use which is sold on the basis of the normal one-way fares represents about 1 per cent or less of the carriers' pas-

senger revenues (91, 139).'' (Carriers' Brief before the Interstate Commerce Commission, pp. 15, 16.)

CARRIERS' PETITION BEFORE THE LOWER COURT.

There are certain statements contained in the carriers' petition and brief before the lower court that may be presented to this tribunal, which deserve mention. There is a large volume of duplication in different portions of these documents. The petition has many of the characteristics of an argument, and we shall attempt in the following passages to discuss very briefly certain propositions they have stated, this being done consecutively in the order presented by the carriers. This plan, unfortunately, will occasion a similar duplication, which seems to be unavoidable. We shall endeavor to eliminate as much of this as possible. (In future citations to the brief filed by the carriers before the lower court we shall use the expression: Carriers' Brief.)

At this time we shall not undertake to place these comments in order under the headings used in our general argument, but shall simply attempt to recite them in the order as they appear in the petition of the carriers in the first instance.

The first eight sections in Carriers' petition before the Lower Court are largely devoted to formal allegations.

In paragraph IX of said petition the carriers allege that the Commission established as the "just and reasonable rate" for the transportation of passengers "the rate of 3.6 cents per mile, which rate of fare accordingly became the established just and reasonable rate for this service."

This is an erroneous allegation, due to a misconception

tion of counsel for the carriers, as to the character of the decision by the Interstate Commerce Commission in *Ex Parte* 74. This will be presented fully in that portion of this brief under the heading Argument.

Other references to the rate of 3.6 cents, repeatedly made in the petition as being the "established just and reasonable rate" are likewise erroneous.

Paragraph X of the Carriers' petition before the lower court alleges a variation between the findings of fact and the conclusions of the Commission. The carriers, aside from this general allegation, cite certain figures, the additional costs being alleged to equal \$1,600,000. The Commission considers this as an offset to the interest on the \$300,000,000 which the carriers say they will receive in advance of the use of these scrip books. The propriety and sufficiency of this offset will be considered in conjunction with the other cost accounting under the heading relating to the alleged confiscatory character of the order of the Commission which will be presented in that portion of this brief labeled, "Argument."

In paragraph XI, the carriers allege that the order of the Commission at issue will require them to perform service at rates which are noncompensatory. They then refer in an argumentative manner to the operating ratio on all passenger traffic and attempt to demonstrate the net loss.

In paragraph XII of their petition, the carriers allege that the physical conditions of transportation are the same for the holder of the scrip coupon as for other passenger travel under the standard fare in an ordinary interstate train.

A similar comment could be made as to preachers,

railroad employees, tourists, excursionists, delegates to political and church conventions, etc.

The significant factor is that the average inhabitant travels only about 250 to 350 miles per year, whereas the holders of these tickets must travel 2,500 miles or seven or eight times as much; and on an average the holder of these tickets will probably travel 5,000 miles or more.

Paragraph XIII of the carriers' petition raises a similar issue as paragraph XII, except that it refers to the unreasonable preference under Section 3 of the Act.

Paragraph XIV refers to the alleged erroneous interpretation made by the Commission of Section 22 of the Act.

The decision of the Commission must be interpreted as a whole. This particular phase of the subject will be considered in argument.

Paragraph XV of the carriers' petition alleges the discrimination between parties. The gravamen of the complaint is that the "carriers are required to discriminate in favor of such persons as contemplate 2,500 miles of travel in one year and are in a position to pay \$72 in advance for such transportation." If such a discrimination even existed the carrier is not the proper party complainant. This paragraph raises another important legal issue relating to the power of the legislative branch of the government.

Paragraph XVI protests against any period of experiment in order to test the effect of the order on actual traffic.

Paragraph XVII has to do with the alleged violation of Section 15-A of the Interstate Commerce Act, which

requires the Commission to establish rates that will produce as nearly as possible a rate of return on the value of the property to be fixed by the Commission.

They claim that the present rates fail to produce the return required by statute and that the reduction in the passenger revenue will therefore constitute a violation of the requirements of the Act.

There is a confusion in the minds of the authors of this paragraph.

Section 15-A of the Interstate Commerce Act refers to net revenue, not gross.

It is our claim that the order at issue in this case will increase the net revenues of the carriers and not decrease them. It will initiate a greater volume of traffic and help the commercial world to shake off this paralysis in business that has followed in the wake of the war. The trains and cars and the roadbed are all ready for operation. The cars are almost half empty. Every passenger added means practically a net increase in the revenues of the carriers by the amount of the fare which he pays.

In this paragraph counsel allege in regard to the sixty million dollar loss in their net income: "This estimate was not questioned by the Commission in its findings." The fact is the Commission did not mention this item in any part of their decision. (They do quote from the railroads in a table in the Appendix to the opinion.) The fact that a claim made on the record is not mentioned in the decision, is not a justification for the assertion that the Commission adopted such a claim as correct; in fact, the deduction is usually made by counsel in a case that such an incident is evidence of directly the reverse, that the Court or Commission declined to adopt the figure as correct.

In paragraph XVIII of their petition, carriers again argue that the Commission has adopted 3.6 cents as the standard rate, and that the actual cost of transportation of passengers on the rates established in this order at issue is no less than the cost of passengers using tickets at the standard rate. Further they say: "On the facts as found by the Commission a just and reasonable fare for the holder of a scrip coupon ticket good for ordinary transportation on all trains throughout the United States cannot possibly be less than a just and reasonable fare for the transportation of any other passenger receiving the same service."

If they mean that travel in an ordinary train compels the adoption of the so-called "standard rate" exclusively, then practically all tourists' rates, excursion rates, etc. (and likewise commodity traffic in the freight service), are unreasonably low. Even though two parties are on the same train just as two tons of freight are being hauled in the same train, there are other factors that must be considered in railroad transportation which may justify a lower charge.

Carriers again say in paragraph XVIII of their petition that the Commission, by its decision in Increased Rates, 1920, "established the basic rate of fare of 3.6 cents per mile as the just and reasonable basic rate of fare generally throughout the United States." It will be found that the Commission made no such finding or order in the said case.

Paragraph XIX refers to the credit one railroad company must give another by order of the Commission. This involves one of the important issues which will be discussed later.

Paragraph XX of carriers' petition claims the require-

ment to transport passengers for less than the just and reasonable rate of fare as determined by the Interstate Commerce Commission in the proceedings previously described, constitutes a violation of the Fifth Amendment, and is void, because a passenger may only use the scrip coupon ticket for one trip on that particular railroad issuing the ticket. If we consider the railroads as a whole, as a large system operating under joint arrangements approved by the Interstate Commerce Commission, this is a necessary incident—a detail. If a half a dozen railroads join in the establishment of a through commodity rate on coal or sandstone they would do this very same thing under the same contingencies. One carrier might obtain none of the commodity traffic thereby inaugurated except one haul, and yet the rates would become effective by voluntary action of the railroads or by order of the Commission itself. It cannot be otherwise, as a practical matter, if we are to have joint rates and joint through routes.

Paragraph XXI relates to the authority of the Commission to exempt one carrier from the provisions of the order under consideration where the peculiar circumstances shown to the Commission shall justify such exemption.

Paragraph XXII excepts to the order on the ground that it affects state traffic as well as interstate traffic.

In reviewing the petition of the carriers it will be seen that there are many duplications. In their brief before the lower court these various propositions are again argued in many different ways.

The claims of the carriers are stated at great length under twenty-three sections of their petition, six head-

ings and nine subheadings in their brief. The principal claims can be summarized as follows:

First—That the Commission acted under an erroneous interpretation of the law, in that they considered the congressional act required the establishment of interchangeable tickets at reduced rates.

Second—That the order of the Commission creates an unjust discrimination between passengers, and is therefore unlawful.

Third—That the passenger fares ordered by the Commission are confiscatory, and the said order is therefore void, taking the property of the carriers without due process of law.

Fourth—That the order is void because of the exemptions ordered by the Commission.

Fifth—That the order of the Commission is void because it applies to intrastate commerce.

Sixth—That the order of the Commission is void because it requires one carrier to give credit to another carrier, thereby taking the carriers' property without due process of law.

Seventh—That the order is void because it violates Section 15a of the Interstate Commerce Act.

Eighth—That the order is void because it is experimental.

In addition, there is a general allegation made as to several of the propositions just stated, to the effect that the evidence does not support the conclusions of the Commission.

The lower court sustained the carriers on the first proposition, declined their claim as to the sixth proposition, and did not pass upon the others.

ASSIGNMENT OF ERRORS.

Appellants' assignment of errors is as follows:

The District Court erred:

I. In denying the motion of the United States to dismiss the petition and in not sustaining the motion.

II. In deciding, holding and adjudging as follows:

Although the carriers opposed any reduction in rates for the scrip coupons below the standard rates, it is clear from the record that the Commission proceeded on the assumption that the spirit and theory of the Congressional amendment required them to order the scrip coupons to be issued at reduced rates, at least in so far as such rates could not be deemed confiscatory. There is no finding in the record that would indicate that the Commission, if it had exercised an independent judgment apart from what it conceived to be the plain spirit and theory of the amendment, would have ordered the scrip coupons to be issued at reduced rates.

III. In deciding, holding and adjudging as follows:

The only finding of the Commission that could possibly be relied upon as indicating that the Commission exercised an independent judgment is the statement in the majority report that "in addition to the

obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established, at least for an experimental period." But this finding is followed by the statement that "in no other way can the apparent purpose of the law be given practical effect." It would seem fairly plain, therefore, that the furthest the Commission goes in its finding is to conclude that the record might justify the issuance of coupons at reasonably reduced rates for an experimental period; but there is nothing to indicate that the Commission, if it had felt free to exercise its own judgment, would have assumed the responsibility for establishing the reduced rate, even for an experimental period.

IV. In deciding, holding and adjudging as follows:

It is not entirely clear whether the majority of the Commission acted under an interpretation of the amendment that it was mandatory upon them so to reduce the rates for interchangeable scrip coupon tickets, or upon an assumed desire of the Congress, though not expressed by the amendment in mandatory form, that they should so do.

V. In not sustaining the order of the Interstate Commerce Commission.

VI. In not dismissing the petition.

VII. In issuing the permanent injunction.

(The National Council of Traveling Salesmen's Association, *et al.*, added the following to the assignments made by the Government and by the Commission: The District Court erred: (V) In deciding, holding and adjudging as follows):

That either "the Commission acted upon a different interpretation of the amendment" and thus that "an error of law was the basis of its action and order" or that it "based its conclusions not upon its own independent judgment, but upon what it believed to be the spirit and purpose of the act, which, if it means something other than a sound interpretation of the act, must mean some supposed desire of the Congress," and thus "acted contrary to law in abdicating the functions vested in it."

"In either case its orders is without warrant of law and for this reason it must be annulled."

The carriers have made no appeal from any portion of the decision of the lower court.

ARGUMENT.

The order at issue in this proceeding was made by the Interstate Commerce Commission, directing Class I railroads (with certain exceptions specifically named) to sell nontransferable, interchangeable scrip coupon tickets (hereinafter generally called scrip books), of 2,500 miles each, at a discount of 20 per cent below the fares on ordinary one trip tickets, the same being good for one year from date of purchase. Various rules and regulations were specified, concerning which there seems to be no substantial differences between the parties.

Many objections, which we have outlined in the Statement of the Case, were urged against the order by counsel for the railroads, the petitioners below.

The carriers were sustained by the lower court on one proposition only; and that related in substance to the alleged misinterpretation by the Commission of the law under which the order was issued.

The carriers gave chief attention in their brief and argument before the lower court to the issues relating: first, to the alleged discrimination created by the order at issue, as between passengers holding the scrip books, and those paying the ordinary fares; and second, to the

alleged confiscatory character of the order of the Commission.

Counsel for the railroads have made two basic mistakes of fact which permeate their entire argument.

We shall consider in argument: First, the proposition on which the carriers have been sustained by the lower court; Second, the two basic propositions of fact concerning which the carriers are in error; and then we shall proceed with a discussion of the other issues involved.

I. THE COMMISSION CORRECTLY INTERPRETED THE LAW UNDER WHICH THE ORDER AT ISSUE WAS MADE.

The lower court bases the injunction order upon what it conceives to be a misinterpretation by the Commission of the Amendment to Section 22 of the Act to Regulate Commerce, under which the Commission rendered the decision at issue.

The Court rests its conclusion enjoining this order of the Interstate Commerce Commission, upon eight lines in the decision of the Commission. The only places in which the Commission makes reference to the "spirit or purpose of the law" are in the five lines quoted by the court, and in one other passage which contains one clause which the Court uses. (Commission's decision, 209.) At no other place in the entire decision of the Commission is there any reference to this so-called purpose or spirit of the law.

There is much force to the comments of the Commission as to the intent of Congress; but we believe a fair review by this court of the record and decision of the Commission will not warrant the contention that the Commission in this proceeding under investigation, yielded its judgment as to what was the reasonable rate to any other tribunal, knowing as it did, the requirement

of the law that the discretion rested with the Commission.

We feel that it would hardly be proper to depend upon a few selected passages of the Commission's decision to determine what it had in mind, and upon what it based its conclusions. It is necessary for us to consider the decision of the Commission as a whole, in order to reach a fair determination of this issue.

From the few lines referred to above the Court concludes that if the Commission acted upon some other theory than that the determination of what should be 'the just and reasonable rates for such coupons is placed entirely upon the Commission,' then "an error of law was the basis of its action and order." But if the Commission based its conclusion upon 'some supposed desire of the Congress, it acted contrary to law in abdicating the functions vested in it.' *New York Central R. Co. et al. v. U. S.*, 288 Fed. 951, 953, 954.

Let us consider, first, whether the Commission interpreted the Act as mandatory or not; and second, did the Commission undertake to assume the responsibility put upon it by the law and to decide the issue, or did it abdicate its functions?

(1) What was the Commission's interpretation of the law?

It would seem that if the court were right in its interpretation of the Act, then the Commission had a correct conception of the law, for at the very beginning of its decision the Commission uses language concerning the Act, which states in substance precisely the same interpretation of the statute which the court itself declared in its decision. These two passages evidence the

fact that the Court and the Commission had the same conception of just what the law required.

The Court says:

"The fair and natural interpretation of the language used by the Congress makes mandatory the issuance of such coupons at just and reasonable rates; but the ultimate, if not the original, determination of what shall be just and reasonable rates for such coupons is placed entirely upon the Commission." (*Id.*, 953.)

The Commission says:

"The act is mandatory in that it directs us, after notice and hearing, to require each carrier by rail subject to the act to issue 'interchangeable mileage or scrip coupon tickets.' It is discretionary in that we may prescribe either an interchangeable mileage ticket or a scrip coupon ticket. It is also left to our judgment to determine after notice and hearing the 'just and reasonable rates' at which the form of ticket prescribed shall be issued." (Com. Dec. p. 202.)

The Court says:

"If, therefore, the Commission acted upon a different interpretation of the amendment, an error of law was the basis of its action and order." (*N. Y. C. v. U. S.*, *supra*, 953.)

But we have just seen that the Commission did not make this error of law, for it adopted precisely the same interpretation of the law which the court itself adopts

(2) What course did the Commission follow as to investigating and deciding for itself what were just and reasonable rates? Did it abdicate the function vested in the Commission?

At the very beginning of the investigation the Commission issued a notice of a public hearing, and the sec-

ond interrogatory proposed for consideration at that hearing was:

“What rate or rates shall be established as just and reasonable for each or either form of ticket?”
(Commission’s decision, 201.)

Counsel for the carriers make claim that there were no findings of fact made by the Commission in support of its decision, and that there was no substantial evidence of record in support of the same. This same thought is suggested in the second observation by the Court quoted above, and again where the Court says that there is no finding in the record that would indicate the Commission, acting independently, would have ordered the scrip coupons at reduced rates.

It is true that the Commission states the facts cited by the carriers tending to support their claims; but it is also true that the Commission states the facts which are opposed to the claims of the carriers, and which offset those presented by the railroads sufficient to justify the decision of the Commission. A few of the latter group will be gathered together for convenient reference; it being remembered that the relative weight to be attached to these as compared to the facts adduced on the other side, rests with the Commission and not with the Court.

Speaking of the claims of the traveling men, the Commission says:

“All urge that the tickets should be sold at 33½ per cent less than the standard fare and that they would stimulate travel to such an extent as to offset any decrease of revenue that might result from the reduction in the fare. They say that the stimulus from the use of such a ticket would in all probability result in increased revenue. They also urge that salesmen would by their sales stimulate the movement

of freight traffic and thereby augment freight revenue." (Com. Dec., p. 206.)

In its concluding paragraphs the Commission says:

"It is a well-recognized rule in trade and commerce that, other things being equal, as the price of an article is lowered the sales increase. And the fact that for many years prior to Federal control carriers voluntarily sold mileage books at discounts ranging from 10 to 33 $\frac{1}{4}$ per cent is not without significance. That commutation and excursion fares create traffic is conceded by carriers. That some additional traffic would be created by a scrip ticket at reduced fares may fairly be assumed, although it is impossible to determine how much. Many unused coupons would not be redeemed while others which remained in the book near the end of the year or season would undoubtedly be used for passenger travel that would not otherwise occur. A scrip ticket at reduced fares could not be justified solely upon the theory that the cost per passenger-mile might thereby be reduced, although it is apparent that anything that will tend to cause a fuller utilization of passenger-train facilities without overcrowding will also tend to reduce the average cost per passenger-mile." (Com. Dec., 209.)

After reviewing the evidence, the Commission makes the following unqualified and clear finding of fact:

"We further find that the rates resulting from that reduction will be just and reasonable for this class of travel." (*Id.*, 210.)

We submit that there has not been an erroneous interpretation of the Act, and that the Commission did not abdicate.

As to whether the evidence adduced is sufficient to warrant the decision announced is not for the Court to determine.

WEIGHT OF EVIDENCE.

In discussing the opinion of the Commission, counsel for the carriers have urged as to many of their propositions, that there were no substantial findings of fact made by the Commission in support of the conclusions announced. That is also the burden of a large portion of the Court's opinion. As to orders of this character the Commission is not required by statute to make detailed findings in support of their conclusions. The Commission has announced certain specific conclusions which are sufficient to support its order. If there was no substantial evidence in support of those conclusions, of course the order should fail. But if there was such evidence, the order should stand. In considering the record it is not within the province of the court to weigh the evidence or to consider the wisdom of the order entered. (New England Divisions Case—*Akron, etc., R. Co. v. U. S.*, U. S., 67 L. ed. 308, 316; citing *Manufacturers R. Co. v. U. S.*, 246 U. S. 457; *Skinner, etc., v. U. S.*, 249 U. S. 557; *Seaboard Air Line v. U. S.*, 254 U. S. 57.)

The probative weight attached to conclusions reached by the Commission was expressed by Mr. Justice Lamar in another proceeding, when an order of the Commission was under attack, as follows:

The value of evidence in rate proceedings

“necessarily varies according to circumstances but the weight to be given it is peculiarly for the body experienced in such matters and familiar with the complexities, intricacies, and history of rate making in each section of the country. * * *

“It is true that the old low locals from Mobile (west) to New Orleans were maintained, while those

from New Orleans (east) to Mobile were raised is not conclusive against the reasonableness of new tariff put in force in 1907. But it was a fact tending to support the conclusion, unless the difference was shown to have been warranted by proper rate-making rules. * * *

"The order of the Commission restoring a local rate that had been in force for many years, and making a corresponding reduction in the through rate was not arbitrary, but sustained by substantial, though conflicting evidence. The courts cannot settle the conflict, nor put their judgments against that of the rate-making body, and the decree is reversed." *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 57 L. ed. 431, 436, 437.

In *Interstate C. C. v. Union P. R. Co.*, 222 U. S. 541, the Court stated:

"In determining these mixed questions of law and fact, the Court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. * * * Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." (*Id.*, 548.)

Under subsequent headings in this brief we shall have occasion to review some of the essential facts tending to support the conclusions of the Commission.

II. THERE IS NO GOVERNMENT ESTABLISHED PAS- SENGER FARE OF 3.6 CENTS PER MILE.

Counsel for the railroads say in their brief before the lower court:

"As stated above, by its decision in *Increased Rates, 1920* (58 I. C. C. 220), the Commission had established 3.6 cents per mile as the just and reasonable rate for the transportation of passengers throughout the United States. In *Reduced Rates, 1922* (68 I. C. C. 676), the Commission, though importuned to reduce passenger fares, reaffirmed its decision that 3.6 cents per mile was just and reasonable for the transportation of passengers." Carriers' Brief, p. 6.

This proposition is repeated in almost that same phraseology 15 times in the carriers' petition and brief before the lower court.

The carriers have fallen into an error on this proposition. This constant reference by counsel to the establishment by the Commission of a 3.6 cents fare in 1920 is fallacious in every instance where stated.

In the decision entitled "*Increased Rates, 1920*," *supra*, to which the carriers refer, the Commission authorized an increase of 20 per cent in all passenger fares, and the term "passenger fares" was specifically interpreted to mean not only the so-called standard local or interline fares, but also excursion fares, convention fares, special

fares, commutation fares, etc. Consequently, instead of establishing the rate of 3.6 cents the Commission in fact established maximum fares for local, interline, excursion, convention and other special occasions, for commutation and other multiple forms of tickets, extra fares on limited trains and club car charges. (*Id.*, 242.)

The conclusions of the Commission in the said case as to passenger fares were stated in the following language:

"We conclude that increases as indicated next below may be made by all steam railroads subject to our jurisdiction serving the territory embraced in the groups hereinbefore designated.

"1. All passenger fares and charges may be increased 20 per cent. The term 'passenger fares,' may be considered to include standard local or interline fares; excursion, convention, and other fares for special occasions; commutation and other multiple forms of tickets; extra fares on limited trains; club car charges.

"2. Excess baggage rates may be increased 20 per cent provided that where stated as a percentage of or dependent upon passenger fares the increase in the latter will automatically effect the increase in the excess-baggage charges.

"3. A surcharge upon passengers in sleeping and parlor cars may be made amounting to 50 per cent of the charge for space in such cars, such charge to be collected in connection with the charge for space, and to accrue to the rail carriers.

"4. Milk and cream are usually carried in passenger trains, and the revenue therefrom is not included in freight revenue. Rates on these commodities may be increased 20 per cent." (*Id.*, 242.)

The average fare from all revenue passenger traffic for the year 1919, which was available at the time of the decision of the Commission in the case just cited, amounted to 2.54 cents. In 1918, this was 2.42 cents; and in 1920, it was 2.75 cents. (Basic figures are given

in the decision cited, Reduced Rates, 1922, 68 I. C. C. 676, 686, 727.)

Counsel for the railroads further say that in Reduced Rates, 1922, *supra*, the Commission though importuned to reduce passenger fares reaffirmed its decision that 3.6 cents was "just and reasonable for the transportation of passengers." That statement is also erroneous. The Commission recited extensive statements of fact, but made no finding as to what would constitute reasonable fares in the said case.

III. THE FARES ORDERED BY THE COMMISSION WILL BE HIGHER THAN THE AVERAGE FARE PAID ON THE REMAINING PASSENGER TRAVEL OF THE UNITED STATES.

The claim is made by counsel for the railroads that the "established just and reasonable passenger fare" in the United States is 3.6 cents per mile, that this is the prevailing regular fare in all parts of the country, and that the order of the Commission would produce an exceptional class paying much less than practically all the rest of the community.

The law is described prohibiting any discriminations:

"From time to time since the passage of the original Commerce Act in 1887, Congress has by repeated enactments and the most emphatic language prohibited, with severe penalties, granting discriminatory passenger rates under any terms or circumstances to any persons whatsoever." (Carriers' Brief before the lower court, page 4.)

Then we are told that the only persons for whom exceptions to these prohibitions have been allowed are ministers of religion, indigent persons hauled at the behest of municipal governments, and inmates of national homes for soldiers and sailors. The impression this recital leaves on one's mind is that not all, but practically all the people of the United States, with the few exceptions

of ministers, paupers, sailors and soldiers, must pay and actually do pay the full 3.6 cents.

The carreirs claim that the particular type of scrip book here ordered will affect travel now producing approximately \$300,000,000 annually. If that be true it can be mathematically demonstrated that the reduced fare paid by those who will use these scrip books is higher than the average passenger fare paid by the remaining 75 per cent of the travel in the United States. In other words, 75 per cent of the passenger travel today is on a lower plane, on the average, so far as charges are concerned, than this decision of the Interstate Commerce Commission orders for those who must travel at a minimum of 2,500 miles, which is approximately seven or eight times the average travel per inhabitant of the remaining people in the nation. This is a fact based upon statistics of record and in the decision as follows:

Dividing \$300,000,000 by 3.6 cents, we have the total passenger miles thereby affected of 8,333,000,000. The passenger miles for the first six months of 1922 were 16,487,000,000 (Ante, p. 10), and multiplying this by 2 makes the total of 32,974,000,000 for the year. (This is the method adopted by the carriers to secure the estimate for the year 1922.) Subtracting the 8,333,000,000 from the total for the year leaves 24,641,000,000 passenger miles not affected by the Commission's order. (Please note, while 70 per cent of the revenue is not affected by the order, approximately 75 per cent of the travel—measured in passenger miles—will be unaffected; 24,641,000,000 compared to 32,974,000,000.)

It is stated by the railroads that the total passenger

revenue for the year 1922, was approximately \$1,000,000,000. (Carriers' Brief, page 85.) Subtracting the \$300,000,000, which the railroads say will be affected by the Commission's order, leaves \$700,000,000 unaffected. Dividing this revenue of \$700,000,000 by the passenger miles not affected by the order (24,641,000,000) produces 2.84 cents as the average revenue per passenger mile of the 75 per cent of the travel in the United States unaffected by the order. This is lower than for the man who purchases a scrip book and pays the fare on the ordinary one trip ticket of 3.6 cents, less the 20 per cent discount, or 2.88 cents per mile.

The foregoing computations are based upon the carriers' own figures and estimates, not ours. Either they are sound in every respect or the carriers' estimates are wrong.

It is a striking fact that 75 per cent of the travel of the United States is on a lower plane on an average today than the fares ordered by the Commission at issue in this proceeding. And yet we are told that this order creates a preferred class and that those people purchasing the scrip book are going to have a lower charge than the rest of the community obtains. There is an unfortunate confusion of terms here. Instead of using the phrase, "standard ordinary" fare, we ought to have used some such clause as the maximum or the highest charges for passenger travel. The bulk of this travel that has to pay the highest fare is made by the commercial traveling salesmen, these people who are so vitally necessary to American industry; and in order to secure the fare suggested, they must travel a minimum which is seven or eight times the distance traveled by the average person in the United States, as will be demonstrated on a subsequent page.

There is no segregation of costs in the entire record to show how much of this 2.88 cents is profit, and how much of the 2.84 cents is profit.

This computation demonstrates that instead of it being the exceptional and the few who pay less than 3.6 cents, the bulk of the traffic of the country today is hauled at very substantially less than 3.6 cents per mile.

The expressions "standard fare" and "regular fare" that the ordinary traffic pays are misnomers. The average fare, the normal fare, in this country on which 75 per cent of the travel moves today, is less than 2.9 cents per mile.

It is true that widespread discriminations occasioned the enactment of the Interstate Commerce law, and its amendments. These discriminations existed in the freight traffic as well as the passenger traffic. After the passage of these laws, have we adopted a single ton mile revenue in the United States for the freight traffic? Not at all. Commodity rates exist in all parts of the nation, varying with the character of the tonnage, the density and volume of the tonnage, and many other factors.

When the Commission granted certain percentage increases in freight rates in 1920, the resulting rates did not become at that time a hard and fixed schedule, which must be accepted as just and reasonable on all freight traffic during the ensuing two years. If that were true, the Commission could be excused from further performance of their duties so far as hearing rate cases is concerned. As a matter of fact, the Commission has constantly received applications, taken evidence thereon, and rendered decisions making both advances and reductions in freight rates throughout all parts of the United States.

Where the railroads or the Commission fail to establish commodity rates fairly reflecting the needs of the country, both the public and the railroads suffer. It is right that we should have these commodity rates for the best interest of the entire community. And it is right that we should have our passenger fares adjusted to fairly meet the needs of the public.

IV. PASSENGER FARES MAY BE ORDERED VARYING IN ACCORDANCE WITH THE CIRCUMSTANCES AND CONDITIONS SURROUNDING THE TRAFFIC INVOLVED.

. Counsel for the railroads state the following as their leading proposition before the lower court:

"In the response that the Commission's order is an arbitrary and unreasonable discrimination in fares between scrip coupon passengers and regular fare passengers, it is beyond the power of the Commission and lacks due process of law." (Carriers' Brief, 27.)

In support of this doctrine the carriers cite as their leading case the Lake Shore decision. (*Lake Shore & Mich. So. v. Smith*, 173 U. S. 684.)

Our reply to carriers' proposition will be in substance:

1. A carrier cannot be heard in this Court to complain of the unconstitutionality of an Act, or of an order thereunder, because of discriminations created among the patrons of the railroad.

2. The Lake Shore Case and other decisions cited by the carriers before the lower court are not controlling on the issues in this proceeding.

3. The weight of authority and the best interests of the community support the validity of the Commission's order at issue in this proceeding.

We shall discuss these propositions in the order named.

1. A CARRIER CANNOT BE HEARD IN THIS COURT TO COMPLAIN OF THE UNCONSTITUTIONALITY OF AN ACT, OR OF AN ORDER THEREUNDER, BECAUSE OF DISCRIMINATIONS CREATED AMONG THE PATRONS OF THE RAILROAD.

The railroad is not the injured party in any such discrimination as that described in the carriers' proposition quoted previously; and the railroad therefore can not be heard in this case to advance such an argument. This principle has been constantly stated and reiterated in the decisions of this Court. Various cases will be described.

In *Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, it was claimed that the establishment of lower than standard rates on rough material going to companies later shipping finished products created an unjust discrimination against shippers who did not ship certain specific percentages of the finished product. The benefit of the lower rough material rates accrued only to those shippers who handled at least a certain percentage of the products manufactured from the rough material, over the line of the same carrier.

The district court sustained the defense upon the authority of the *Lake Shore Case*, *supra*, and *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79.

The Supreme Court, however, stated that in its opinion "the district court erred in its ruling. The rough material rates were but parts of a general schedule that covered a wide field. This schedule was established in the exercise of the legislative authority of the state, and could not be set aside by the court on the ground of discrimination unless it amounted to a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

"But there is nothing to show that the rough material rates wrought any discrimination against the

railway companies. They were applicable upon all railways alike. If there was—not in the least intimating that there was—undue discrimination as against small shippers or those who had no occasion to obtain transportation for the manufactured product over the line of the same carrier, this was not a matter of which the railways could complain. It is most thoroughly established that before one may be heard to strike down state legislation upon the ground of its repugnancy to the Federal Constitution he must bring himself within the class affected by the unconstitutional feature. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576; *Mallinckrodt Chemical Works v. Missouri*, 238 U. S. 41, 54; *Cusack Co. v. Chicago*, 242 U. S. 526, 530.

“*Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684, did not set aside this established principle. The discrimination in favor of certain patrons, there referred to, was laid hold of rather as showing the unreasonable character of the regulation. The authority of that case is not to be extended. *Louisville & Nashville R. R. Co. v. Kentucky*, 183 U. S. 503, 511; *Pennsylvania R. Co. v. Towers*, 245 U. S. 6.” (*Id.*, 148, 149.)

This same doctrine has been recognized repeatedly in the decisions:

“So far as the present attack is founded upon the commerce clause and the Act to Regulate Commerce, it is sufficient to say that the judgment under review was not based upon a claim arising out of interstate commerce, and hence plaintiff in error does not bring itself within the class with regard to whom it claims the act to be in this respect repugnant to the Constitution and laws of the United States. *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 76; *Tyler v. Judges*, 179 U. S. 405, 409; *Hooker v. Burr*, 194 U. S. 415, 419; *Hatch v. Reardon*, 204 U. S. 152, 160; *Southern R. Co. v. King*, 217 U. S. 524, 534; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 550; *Rosenthal v. New York*, 226 U. S. 260, 271.

Farmers & M. Savings Bank v. Minnesota, 232 U. S. 516, 530; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544." (*M. K. & T. R. of Tex. v. L. C. Cade*, 233 U. S. 648.)

"The argument based upon such discrimination, so far as it affects employes by themselves considered, cannot be decisive; for it is the well-settled rule of this court that it only hears objections to the constitutionality of laws from those who are themselves affected by its alleged unconstitutionality in the feature complained of. *Southern R. v. King*, 217 U. S. 524, 534; *Engel v. O'Malley*, 219 U. S. 128, 135; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 550; *Yazoo & Mississippi Valley R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217, 219; *Rosenthal v. New York*, 226 U. S. 260, 271; *Darnell v. Indiana*, 226 U. S. 390, 398; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544; *Missouri, Kansas & Texas Ry. v. Cade*, 233 U. S. 642, 648." (*Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576.)

In the *Burnham, Hanna, Munger Case*, the *Interstate Commerce Commission v. Chicago, R. I. & P. et al.*, 218 U. S. 88, the carriers attempted to set up alleged discriminations against certain trade centers that would be caused by the order at issue. The Court was willing to listen concerning the effect of the order on railroad revenues, but declined to consider objections made by the railroads because of the effect on shippers and trade centers, saying:

"We have said several times that we will not listen to a party who complains of a grievance which is not his. *Clark v. Kansas City*, 176 U. S. 114, 118; *Smiley v. Kansas*, 196 U. S. 447." (*Id.*, 109.)

Counsel for the railroads in this case recognized that they would be subject to the same ruling relative to a claim of discrimination were it not for the claim they allege as to the confiscatory character of the schedule; in fact, proof of the confiscatory or non-compensatory

character of the rates established becomes a necessary part of the carriers' case in this proceeding, as expressed by counsel. After discussing the decision in *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, *supra*, counsel then proceed as follows:

"This case is no authority against our contention. When the entire schedule of rates had been sustained as not confiscatory, and hence not denying the railroads due process of law, of course a railroad could not raise the point that a particular class of shippers was discriminated against and was denied the equal protection of the laws. That is a question which the shipper who was hurt must raise." (Carrier's Brief, 61.)

These comments of counsel for the railroads on the *Arkadelphia* case are very significant, and almost determinative in the disposition of the present proceeding.

This makes the controlling factor not the allegation of discrimination, but the non-compensatory or confiscatory character of the rates. This issue will be discussed under a separate heading.

2. THE LAKE SHORE CASE AND OTHER DECISIONS CITED BY THE CARRIERS BEFORE THE LOWER COURT ARE NOT CONTROLLING ON THE ISSUES IN THIS PROCEEDING.

The Michigan mileage book case to which we refer as the Lake Shore Case, was quoted at great length and relied upon by counsel for the carriers in their brief before the lower court as the leading case on the issues here involved. (Carriers' Brief, 37-43-44-52-53-57-60-62.)

The Lake Shore decision is not in point. The court there held that after the legislature had established by statute one maximum rate on passenger traffic, the legislature could not proceed to make exceptions. Congress

has never established any maximum passenger fare effective throughout the United States; nor has the Interstate Commerce Commission.

Mr. Justice Peckham defined the issue in the Lake Shore case in the following language:

"The question is presented in this case whether the legislature of a state, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies, with the limitations above stated, and having power to alter, amend or repeal their charters, within certain limitations, has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law." *Lake Shore Case, supra*, 690.

This same thought is repeated several times in the decision.

The declaration of the Court was contingent on there being such a general rate established by the state; and that contingency has been restated in subsequent decisions interpreting the Lake Shore Case.

The Court in restating the principle of the Lake Shore case in *Pa. R. Co. v. Towers*, 245 U. S. 6, said:

"This court held that a maximum rate for passengers having been established that rate was to be regarded as a reasonable compensation for the service and that the fixing of the less rate to particular individuals was an arbitrary exercise of legislative power and an unconstitutional interference with the business of the carrier, the effect of which was to violate the provisions of the 14th Amendment to the Federal Constitution." (*Id.*, 10.)

Counsel for the railroads in this proceeding, realizing the necessity to come under the rule of the Lake Shore

case, have stated and restated the following claim: The Interstate Commerce Commission "established as the just and reasonable rate for the transportation of passengers over the lines of your petitioners and other carriers the rate of 3.6 cents per mile, which rate of fare accordingly became the established just and reasonable rate for this service." (Carriers' Petition, 11.)

Counsel for the railroads have made a fundamental mistake on this phase of the case. The claim that the Commission had established a passenger fare of 3.6 cents which was effective throughout the United States at the time the order at issue was rendered, is erroneous, as we have previously shown.

On June 24, 1918, the Director General of Railroads ordered the so-called "minimum fare" of 3 cents per passenger mile, at the same time cancelling mileage book rates generally. However special fares were continued or reinstated almost immediately, bringing the average down to the figures previously quoted. Government control ceased February 29, 1920.

August 25, 1920, the Commission rendered a decision in what is called *Ex Parte 74*, or "Increased Rates, 1920," *supra*. The Commission did not order a maximum fare or a minimum fare of 3.6 cents per passenger mile as counsel for the railroads declare so constantly, repeating the claim over and over again in their petition and brief before the lower court. It is true that they authorized certain increases in passenger fares, but the percentage of increase was made applicable not only to the 3 cent fare, but to the existing excursion, convention and other fares, commutation and other multiple forms of tickets, extra fares on limited trains, club car charges, also excess baggage rates; also there was an advance of 50 per cent on surcharges in

sleeping and parlor cars. At no time has the Commission singled out the 3.6 cent fare, "establishing that as the just and reasonable passenger rate" throughout the United States. Under a former heading we have reproduced in full the conclusions of the Commission in that decision on the subject of passenger fares.

A reading of this will show nothing approaching the establishment of a single maximum passenger fare similar to the action of the Michigan State Legislature.

It might be correct to say that the average revenue the Commission approved was 2.54 cents per passenger mile (for the previous year) plus 20 per cent, or approximately 3.06 cents. That decision was rendered in 1920. It happens that the average for the first six months of 1922 was 3.03 cents. But the Commission did not adopt that flat figure, for there were very wide variations in the fares approved by the Commission, which produced that average.

There was a great volume of these passenger charges officially recognized and ordered by the Commission in the paragraphs quoted which were below the 3 cent level. They ranged from 2 cents to 3 cents per passenger mile. At the time of this decision the Commission had before it, as previously stated, the returns for 1919 and previous years.

The figures for 1918 and 1919, are contained in the decision of the Commission in the case entitled, *Reduced Rates*, 1922, 68 I. C. C. 676. Dividing revenue passenger miles (p. 727) into passenger revenue (p. 686), it will be noted that the average revenue per passenger mile in 1919 was 2.54 cents; and in 1918, 2.42 cents. This will demonstrate the wide range of passenger fares below the 3 cent basis; and the Commission's order in 1920 as

above quoted, authorized the 20 per cent increase in all of those fares, establishing the resulting figures as the maximum rates on passenger traffic. That decision was rendered July 29, 1920, and was effective the latter part of August, 1920. The decision in the case entitled *Reduced Rates 1922*, being Docket No. 13293, 68 I. C. C. 676, was rendered May 16, 1922. In this last case, the Commission presented an extended discussion of the passenger revenues, but it made no order in regard thereto.

Instead of the present order constituting an exception to a single mileage fare throughout the United States of 3.6 cents, we find ourselves confronted with an order of the Commission which established maximum excursion, convention, standard, local and interline fares and commutation and other multiple forms of tickets throughout the United States, 20 per cent greater than those prevailing at the time of the decision.

Nationally, the situation is very analogous to the condition existing in the State of New Hampshire reported in *State v. Railroad*, 77 N. H. 425. In this case there was an issue as to the constitutionality of the statute establishing 500-mile mileage books at the rate of 2 cents a mile, good for transportation of bearer over state railroad lines in the State of New Hampshire. The decision of the Court in the *Lake Shore Case* was relied upon as the controlling precedent against the validity of the statute under consideration. However, the New Hampshire court held that the circumstances were not the same, the language of the court being as follows:

“From what has been said it follows that the case *Lake Shore etc. Ry. v. Smith*, 173 U. S. 684, relied upon by the defendants, is not now in point. That case does not hold that a legislative enactment fixing a maximum mileage rate is illegal, but expressly

admits the existence of such power, citing cases some of which are hereinbefore referred to. In that case, as stated in the opinion (p. 690), the question presented was 'whether the legislature of a state, having power to fix maximum rates and charges for the transportation of persons and property by railroad companies * * * has also the right, after having fixed a maximum rate for the transportation of passengers, to still further regulate their affairs, and to discriminate and make an exception in favor of certain persons, and give to them a right of transportation for a less sum than the general rate provided by law' and the point decided is expressed as follows (p. 696): 'The legislature having fixed a maximum rate at what must be presumed, *prima facie*, to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike—that no discrimination against it in favor of certain classes * * * shall be made by the legislature.'

"It is not alleged in the instant case that the legislature has fixed any maximum rate which must *prima facie* be considered reasonable. In fact, the legislation as to mileage tickets is understood to be the only instance of a legislative attempt to fix a rate. *Clough v. Railroad*, ante, 222, 232. So far as the legislature has acted, two cents a mile is the maximum rate. If that is a reasonable rate, there is no discrimination. If it is unreasonable, confiscatory, the defendants have a remedy upon proof of the fact. As the record is now presented, it is unnecessary to further consider the federal case cited which binds this court so far as it correctly declares the federal law as now expressed." (*Id.*, 429, 430.)

In view of the error on the part of counsel as to the existence of the nationally established fare of 3.6 cents per mile, and the resulting mistake in attempting to rely on the Lake Shore decision as a precedent, there is little occasion for further consideration of the Lake Shore Case.

However, such constant reference has been made to the decision by counsel, that we feel constrained to further discuss various other phases of this decision.

The Lake Shore case involved a law which is distinguishable from the order of the Commission now under consideration for the following reasons, in addition to those basic differences previously stated:

First: The Michigan act provided for the establishment of mileage books, while the present order concerns scrip coupon tickets. These two have certain essential characteristics which are similar; on the other hand, the scrip book is different from the mileage book.

It was found that the scrip book had all the advantages of the mileage books; and certain other practical difficulties which would arise from the use of an interchangeable mileage ticket will not arise from the use of an interchangeable scrip-coupon ticket. (Com. Dec., 202.) Illustrating this difference between the mileage book and scrip book, we cite the following extract from the brief filed on behalf of all the railroads before the Interstate Commerce Commission, this extract being a statement made before the House of Representatives by Representative Huddleston, as appearing on page 10,455 of the Congressional Record of June 29, 1923:

"I suppose the committee thought the commercial travelers were easy to fool, for they amended the bill by inserting the language 'or scrip coupon tickets' after the mileage-book phrase. This was a complete change in the purpose of the bill, for a scrip coupon ticket is as much like a mileage book as a Kentucky saddle horse is like a spotted bull. They have no relation to each other. The mileage book is composed of units each of which is good for a mile travel. A scrip coupon ticket is composed of units to be used in place of money to purchase tickets." (Br. of Carriers, p. 83.)

The carriers have scrip books in effect today. This is shown on the record before the Interstate Commerce Commission at pp. 91 and 139. (Same brief, p. 16.) It is further shown that only 1 per cent of the carriers' passenger revenues are derived from these scrip books which are currently in use. These were originally "established by the director general and were perpetuated by the carriers after Federal control partly to relieve the congestion at ticket offices in the larger cities, and partly to take the place of the mileage book and thus afford the public the convenience of boarding trains for short trips without the necessity of purchasing a ticket at the ticket office for each trip." (Commission decision page 205.)

At the time of the Commission's decision these scrip coupon tickets, in denominations of \$15, \$30 and 90, sold at the standard fare and were interchangeable among practically all carriers by rail, except electric and short line carriers. (Com. Dec., 205.) The Commission's order in this proceeding also excepts the electric and short line carriers.

Second: The Lake Shore case extended the time during which the tickets should be in force for a period of two years; while the present order is limited to one year.

Third: The Michigan statute permitted all members of the family to use the mileage book; while the Commission's order in this case makes no such broad extension of the use of the tickets.

Fourth: The Michigan statute provided a different basis for northern and southern Michigan; while the present order makes no classification geographically or territorially, but applies the 20 per cent to existing fares as they are adjusted in the different parts of the country.

Fifth: The Michigan statute caused a reduction from

the so-called standard fare of $33\frac{1}{3}$ per cent; while the order at issue in this proceeding involves a reduction of 20 per cent.

Sixth: The record so far as shown in the decision in the Michigan case, evidenced an exception, a lower charge for the special class described than for the rest of the community; and that special rate was $33\frac{1}{3}$ per cent below what all the rest of the community paid; whereas the record in this case, as we have shown previously, demonstrates that 75 per cent of the travel of today is being carried at a lower rate, on an average, than the one ordered by the Commission, and consequently the order does not create an exception analogous to the circumstances in the Lake Shore case.

It would seem that the state legislature of Michigan in allowing the ticket to be used by the entire family and to last for two years, did in fact fail to create a fair, just classification.

That some of the items of distinction listed above were considered of importance by the Supreme Court in reaching its conclusion in the Lake Shore case, *supra*, is evidenced by the following extracts from the Court's decision:

"It assumes to regulate the time in which the tickets purchased shall be valid and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law. *Id.* 691.

"The act also compels the company to carry, not only those who choose to purchase these tickets, but

their wives and children, and it makes the tickets good for two years from the time of the purchase. If the legislature can, under the guise of regulation, provide that these tickets shall be good for two years, why can it not provide that they shall be good for five or ten or even a longer term of years?"

Both factors—the number of people who were to use the ticket, and the length of time it was in force—seemed to impress the Court.

"Regulations for maximum rates for present transportation of persons or property bear no resemblance to those which assume to provide for the purchase of tickets in quantities at a lower than the general rate, and to provide that they shall be good for years to come. This is not fixing maximum rates, nor is it proper regulation. It is an illegal and unjustifiable interference with the rights of the company." (*Id.* 694.)

This Court has held the decision in the Lake Shore case shall not be extended beyond the circumstances in that case (*Arkadelphia Co. v. St. L. S. W.*, 249 U. S. 134; *Pennsylvania R. Co. v. Towers*, 245 U. S. 6), and the Court has also held that certain doctrines announced in the Lake Shore case were to be considered overruled, if in conflict with the decision of the case referred to. (*Pennsylvania R. Co. v. Towers*, *supra*.)

Further, we believe that the principles stated in the Lake Shore case are not sound; that they are in conflict with the doctrines announced in many other decisions which have become well established in the law; that the said principles are dicta so far as they extend beyond the issues of the Lake Shore case; and lastly, that the facts and circumstances in that case, as previously outlined, distinguish it from the one at bar.

The broad, sweeping generalizations used by Mr. Justice Peckham are of such a character that they would very seriously embarrass the whole field of government regulation of common carriers if they had become established and recognized by subsequent decisions. Fortunately, they have not become the accepted law.

The decision rendered by Justice Peckham is based upon the theory that no classification of passenger traffic can be made, and not upon the claim that the case presented an unwarranted classification. This distinction becomes very marked if one follows the reasoning of the Court. We believe the correct doctrine recognized in other decisions is that a variation in rates, though it constitutes what we term a discrimination, does not become an unlawful discrimination by virtue of that fact, but that there must be something more; and that it is just and lawful for rates to vary with the circumstances and conditions. If the rates are established by the Government, there must be a justification for the classification of the shipments or passengers; and if there is such a justification, the law is constitutional and valid.

Mr. Justice Peckham briefly mentions, in passing, the arguments as to wrongful classification. The weight of his entire discussion is concentrated, however, on the proposition that the state once having established one rate for all people to pay, the Government must then rest, and can make no changes as to groups or classes of shippers or passengers whether the classification is just or unjust. The thought is reiterated over and over in the decision.

This decision has never been followed as a controlling precedent on the broad doctrine there stated.

Mr. Justice Peckham would have had it that if the leg-

islature or the Commission fixes one rate that rate must be for the entire community, and then it must cease all attempt to control the charges in the passenger traffic until it makes another horizontal change for everybody. Fortunately, no such theory has ever been injected into our discussion of freight rates, and it is gradually being abandoned in our discussion of passenger fares.

Illustrating the character of the principles upon which Mr. Justice Peckham relied in the Lake Shore case, we call attention to the following passages:

"The legislature having fixed a maximum rate at what must be presumed, *prima facie*, to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike, that no discrimination against it in favor of certain classes of married men or families, excursionists or others, shall be made by the legislature." (*Id.*, 697.)

"If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free.

"If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper." (*Id.* 694, 695.)

In contrast with the foregoing declarations, we call attention to the later decision of this Court in the Towers case, to the following effect:

"That the State may fix maximum rates governing one-way passenger travel is conceded. Having the general authority to fix rates of a reasonable nature, we can see no good reason for denying to the State the power to exercise this authority in such

manner as to fix rates for special services different from those charged for the general service." (*Pa. R. R. Co. v. Towers, supra*, p. 11.)

The principles stated above by Mr. Justice Peckham, speaking for the Supreme Court in the Lake Shore case, do not constitute the recognized and established law concerning this subject, and to the extent that such principles go beyond the particular circumstances of that case, the decision should certainly not be accepted as a precedent; and further, where it is felt that the circumstances are analogous in another case in which the evidence tends to show a just classification of passengers or shippers, then in such a case the Lake Shore decision should be overruled as was done in the Towers case.

The decision in the Lake Shore case, *supra*, was rendered by a divided court, the Chief Justice and Justices Gray and McKenna dissenting.

The decision has been subjected to much criticism subsequent to that date. An attempt to qualify and interpret the decision was rendered by a western state court in a case entitled *In re M. G. Gardner*, 84 Kan. 264, 113 Pac. 1054; 33 L. R. A. (N. S.) 956. The Supreme Court of Kansas had under consideration and held invalid a law of that state, requiring carriers to haul the Kansas National Guard when in the performance of military duty at the rate of one cent per mile; the court quoted at length from the Lake Shore case, *supra*, and then commented as follows:

"This court is not inclined to the view that the power of the legislature is completely exhausted by a maximum rate regulation, and does not so interpret the decision quoted. But members of the National Guard cannot be segregated from the body of the state's citizens, and made a preferred class, unless

they sustain some relation to transportation by rail, which, in the nature of things, indicates they should have the benefit of an exceptional rate. Classification to be valid must be based upon differences in character, condition, or situation which lead to that difference in regulation which the statute undertakes to make." (*Id.*, 958.)

The court then proceeded to discuss the case involving reduced rates for school children on street cars entitled, *Comm. v. Interstate Consolidated St. Ry. Co.*, 187 Mass. 436, 11 L. R. A. (N. S.) 973, 73 N. E. 530. Commenting on it the Kansas court declared:

"This court neither approves nor disapproves the conclusion reached in that case, but the method employed for testing the classification upon which the rate was based is sound." (*Id.*, 958.)

Subsequent events have confirmed the conclusion of this court.

In another case involving special fares for the militia wherein the defense that the law was non-compensatory was waived, a decision was reached practically opposite to that of the Kansas court just quoted.

The law required railroads to haul members of the National Guard at the rate of one cent per mile. During the trial no evidence was taken to sustain the allegations made by the carrier that the rate was non-compensatory or confiscatory in character. At the opening of the trial counsel stated: "The defendant at this time waives any defense or contention made under paragraphs seventh and eighth of its answer." *State of Minn. ex rel. v. Chicago, M. & St. Paul R. Co.*, 118 Minn. 380, 137 N. W. 2, 41 L. R. A. (N. S.) 524, 526.

The court very clearly recognized the propriety of a classification and the establishment of a lower rate for

a given class if that classification be just. On this proposition the Court stated:

"We cannot conceive of any violation of any provision in either Federal or State Constitution where the state requires a railway company to carry its military force for a fair and reasonable compensation. The mere fact that a maximum passenger rate has been fixed at 2 cents per mile does not prove that a lower rate is not compensatory or reasonable under certain conditions. On the contrary, we think it should be assumed, till the contrary appears, that the rate of 1 cent per mile established by the act is valid, and to be valid implies that the compensation is a just and fair equivalent for the service required. But the express waiver of inadequate compensation as a defense takes out of the case the contentions that the law deprives the railway company of its property without due compensation or without due process of law, and that defendant, for that reason, is not given equal protection under the laws." *State of Minn. ex rel. v. Chicago, Mil. & St. Paul R. Co.*, 118 Minn. 380, 137 N. W. 2, 41 L. R. A. (N. S) 524, 526.

On the further question of the discriminatory character of the act in question, the court said it presented a more doubtful issue, but it held that the discrimination could not be interpreted as against the railway company, "if this be discrimination at all it is against the traveling public generally and in favor of the state." The court said that the Kansas court had overlooked the finding of the Supreme Court of the United States to the effect that a discrimination in favor of the state is not illegal. It relied upon the decision of the Supreme Court in the Consolidated Gas Company case.

"In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034, where a legislative act was attacked as discriminatory, the syllabus, in part, is: 'Provision in a gas rate act establishing one rate for the municipi-

pality and another for individual consumers is not an unreasonable classification, and does not render the act unconstitutional under the equal protection clause of the 14th Amendment. Where none of the different classes of consumers complain of different rates, the corporations cannot complain of such differences, provided the total receipts are sufficient to yield an adequate return.'” (*Id.* 527.)

The Massachusetts case cited above will receive further consideration later. At this time we shall review the extended list of mileage book cases which the counsel for the carriers brought together in their brief, in an attempt to indicate the wide acceptance of the doctrines of the Lake Shore decision.

REVIEW OF CARRIERS' SO-CALLED MILEAGE BOOK DECISIONS.

In the carriers' brief, an attempt is made to present an analysis of decisions concerning mileage books. The review commences with the following declaration on page 36:

“The principle of the mileage book or scrip-coupon ticket at a lower rate has been condemned as an arbitrary and unjust discrimination in the following decisions.”

After discussing numerous cases, counsel state on page 53:

“The above are all the cases dealing directly with mileage or scrip-coupon tickets. There are, however, a number of important decisions directly based upon other special forms of passenger fares in which this point has been considered.”

Then follows a list of other cases. Counsel may not have intended these comments as to all intermediate cases cited; and yet the text would so indicate.

We shall undertake a brief analysis of these so-called mileage book cases in the order used by counsel:

1. *In re Mileage Books*, 28 I. C. C. 318, 323:

The charge made by counsel for the carriers that the Commission in this case condemns the mileage book as "an arbitrary and unjust discrimination," is wholly unfounded. If it were an unjust discrimination it would be unlawful, and yet the Commission recognized the fact that it was lawful. The Commission held that it had no power to require the carrier to maintain such a tariff. This was before the present statutory requirement.

2. *Proposed Increases in New England*, 49 I. C. C. 421:

In this case it is true that the Commission found great abuse in the practice relative to mileage books in New England, which was severely condemned. It is also true that the Commission found party rate tickets subject to great abuse in the same territory:

"The General Passenger Agent of the Boston and Maine, testified that the 12-trip tickets, which are said to be sold in no other part of the country, result in greater abuse than any other form of ticket." (*Id.* 445.)

However, the Commission did not condemn the mileage books as constituting an unjust discrimination, but instead they authorized a continuance of mileage books at one-tenth to one-eighth cent below the standard fare, so-called; and also the Commission authorized 25-trip family tickets at one-half cent per mile below the regular one-way ticket. These family tickets were to be usable all over the Boston and Main Railroad and throughout Massachusetts. (*Id.* 445-446.)

3. *Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684:

The carriers describe this as "the leading case." It is not in point for the reasons which we have stated quite extensively elsewhere.

4. *Beardsley v. N. Y., L. E. & W. R. R.*, 162 N. Y. 230; 56 N. E. 488:

This case involved a statute requiring the issuance of mileage books for a thousand miles. Without discussing the principles involved, the New York court accepted the decision in the Lake Shore case as controlling. In a concurring opinion, Mr. Justice Vann stated:

"This case is necessarily governed by the principles laid down by the Supreme Court of the United States in *Railway Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. ed. 858. While I do not yield assent to the reasoning of that great court in that case, I am compelled to yield to its power, and vote for reversal, but not for a dismissal of the complaint. As the action of the courts below was in accordance with the law of this state as it was, apparently, if not actually, when they acted, the reversal should be with leave to the plaintiff to apply at special term for permission to discontinue without costs, on the ground that the further prosecution of the action has been made impossible by a controlling decision not rendered by a court of this state." (*Id.* 489.)

The carriers omit reference to another New York case involving mileage books, which is known as the *Purdy case*, which we shall discuss later.

5. *Commonwealth v. Atlantic Coast Line R. R.*, 105 Va. 61; 55 S. E. 572:

In this case there were some very burdensome regulations involved, requiring the carriers at all stations both

where they stopped regularly and where they stopped on flag, to be kept open day and night for the sale of mileage books. The books were good for all members of the family as well as for the purchaser.

6. *State v. Great Northern Ry.*, 17 N. D. 370; 116 N. W. 89:

This decision involved a statute providing a general passenger fare of $2\frac{1}{2}$ cents, and a mileage book fare of 2 cents, and consequently is not in point in the present proceeding for the same reasons that the Lake Shore case is not in point.

7. *State v. Bonneval* (La.), 55 So. 569:

This case is analogous to the Lake Shore case, in part. There was a maximum fare law prescribing a 3-cent fare. The carriers were maintaining, voluntarily, a $2\frac{1}{2}$ -cent mileage book rate; but the state attempted to prescribe certain rules and regulations, amongst which was the requirement that the said mileage ticket should be good for any member of the family of the holder of the book. On the precedent of the Lake Shore case the court held the statute unreasonable. In the present controversy no such issue is presented. The rules and regulations proposed by the Commission have been accepted by all parties.

8. *Chicago R. I. & P. Ry. Co. v. Ketchum*, 212 Fed. 986:

This case does not involve mileage books, but concerns excursion tickets to a state fair; further, the court found the rates non-compensatory.

"There is no conceivable chance of profit to the railroad company which would make this law valid."
(Carriers' Brief, 45.)

9. *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585:

This case involved coal rates and is not a mileage book case. Further, it involved a requirement, according to the digest of the railroad counsel "to transport it (the commodity) at a loss or without substantial compensation." (Carriers' Brief, p. 46.)

10. *Atlantic Coast Line R. R. v. North Carolina Corporation Commission*, 206 U. S. 1:

This case did not involve mileage books at all, but concerned train schedules.

11. *Vandalia R. R. v. Schnull*, 255 U. S. 113, 119:

This case was not a mileage book case,—it involved freight rates on groceries.

12. *Norfolk & W. Ry. v. West Virginia*, 236 U. S. 605, 608, 609:

This case was not a mileage book case, but involved a flat passenger fare on all traffic. The operating ratio on passenger traffic was 97.42 per cent, and that included express traffic. The leading witness for the state admitted that if express traffic were excluded, the passenger traffic would be handled at or about cost.

13. *Chicago, Milwaukee & St. Paul R. R. v. Wisconsin*, 238 U. S. 491:

This is not a mileage book case, but involved a statute virtually requiring the carrier to make a gift of an additional berth to a passenger if the upper were not occupied, which is rather far-fetched as a case in point in our present discussion.

14. *Railroad Commissioners of Georgia v. Louisville & Nashville R. R. Co.* (Ga.), 80 S. E. 327:

This was not a requirement as to the establishment of mileage books, but it did require the railroads to permit the tearing off of the coupons on the trains where the carriers themselves sold the mileage books or scrip-coupon tickets.

15. *State v. Maine Central R. R. Co.* (N. H.), 92 Atl. 837.

In this proceeding the carriers have sadly distorted the findings of the Supreme Court of New Hampshire, saying:

“The only question raised or decided, however, was as to the sufficiency of the fare, it being contended that the statute was confiscatory.” (Carriers’ Brief, 53.)

As a matter of fact the New Hampshire court cites the Lake Shore case, *supra*, and directs specific attention to the distinguishing feature comparing the Michigan and New Hampshire statutes in that the latter had not prescribed any general maximum passenger fare prior to the enactment of the mileage book legislation.

That concludes what the carriers say constitutes “all the cases dealing directly with mileage or scrip-coupon tickets.” This long list of so-called mileage book cases, when simmered down, may be summarized as follows:

Seven of them, or almost one-half the total number, do not concern the validity of requirements for the issuance of mileage books.

Two of them—the Louisiana and the North Dakota decisions—involve the validity of mileage book legislation, but like the Lake Shore case, they are not in point, because there is also a general statutory maximum fare in effect, thereby coming under the alleged rule of the

Lake Shore case, and by that very reason being distinguished from the pending litigation.

None of the cases cited by the carriers deal with interchangeable scrip-coupon books.

Only two of the decisions involved statutes relative to mileage books not accompanied by a general law in the same state prescribing a single maximum passenger fare. One of these (*State v. Maine Central, supra*), held contrary to the claims of the carriers in the pending case; and the other (*Commonwealth v. Atlantic Coast Line, supra*), held in their favor. The latter case, however, involved a very unusual law, described as follows:

"The Virginia mileage Act requires the companies at all times, day and night, at all stations, regular and flag, to keep on sale books of 500 miles and over, and that 'it shall be unlawful for any transportation company or corporation operated by steam to charge or collect a greater sum than two cents per mile on such mileage books, and such mileage books shall be good and valid for the use of any dependent household member of the family of the party to whom issued, dwelling under the same roof, within one year from the date of same.'" *Commonwealth v. Atlantic Coast Line R. Co.*, 105 Va. 61, 7 L. R. A. 1086, 1093.

We shall supplement the foregoing list of cases with certain decisions that the carriers have omitted from their list, and also with a few leading cases in which the fundamental principles involved are very ably stated.

The force of the Beardsley, New York case is very seriously weakened by the subsequent Purdy decision, which carriers fail to mention in their analysis.

The *Purdy Case*, 162 N. Y. 42; 56 N. E. 508.

Counsel for the carriers cited the case of *Beardsley v. New York, etc., supra*, but neglected to cite in their list

of mileage book cases another decision (*Purdy v. Erie R. Co., supra*), rendered approximately at the same time by the same court, (the Beardsley case being decided March 2, 1920, and the Purdy case, February 27, 1900). In this later case the Court of Appeals of New York sustained the constitutionality of the law establishing mileage books in that state as applying to companies incorporated subsequent to the enactment of the legislation. There had been an amendment to the previous law passed in 1895, but the court found that all changes were favorable to the railroads and held that the defendant company should be required to keep mileage books for sale in accordance with the provisions of the law. "The authority to construct and operate a railroad is not the natural right of a citizen, but a franchise proceeding from the favor or grant of the state. As a condition of such grant, the legislature might require the company to transport passengers at any prescribed rate of fare." (*Id.*, 45.) The decision was concurred in by the Chief Justice, Gray, Bartlett, Vann and Werner. Justice Martin concurred in the result. There was no dissent.

The Purdy case, *supra*, was appealed to the Supreme Court of the United States. (185 U. S. 146, 46 L. ed. 847, 22 Sup. Ct. Rep. 605.) The Supreme Court did not pass upon the alleged violation of the 14th Amendment because it was held that the issue had not been properly raised in the federal courts.

Horton v. Erie, 72 N. Y. Supp. 1018.

Minor v. Erie, 171 N. Y. 566.

The precedent established in the Purdy case as decided in the Supreme Court of New York was followed in *Horton v. Erie*, 65 App. Div. 587, 72 N. Y. Supp. 1018,

and *Minor v. Erie*, 171 N. Y. 566, 64 N. E. 454, which the carriers also omitted from their analysis.

Duluth Street Railway Co. v. Railroad Commission of Wisconsin, . . Wisc. . . , 152 N. W. 887.

The principle of the mileage book as announced in the *Lake Shore* case was invoked by the Duluth Street Railway Company in a case arising in Wisconsin, involving an order that six tickets should be sold for 25 cents upon the street railway. The Supreme Court of Wisconsin refers to the ruling in the *Lake Shore* case concerning discriminations against the purchasers of the ordinary one trip ticket, and concerning the principle that the law does not recognize wholesale and retail rates in matters of transportation and then holds as follows:

"It is argued that here a discrimination is practiced between those who desire to purchase only a single ride and in favor of those who are able and willing to invest 25 cents in tickets. To so hold would amount to carrying the doctrine of discrimination to a ridiculous limit. The idea that it is a burden on any one who desires to patronize the street railway company to invest 25 cents in tickets is pretty far-fetched." (*Id.*, 894.)

Counsel's imposing list of mileage book cases becomes rather weak on analysis. Only one of the decisions is by the Supreme Court, and that one has been subjected to very serious criticism by other decisions of this Court, as well as by those of other courts, both state and federal.

Under the following heading we shall present a review of a few of the leading decisions of the various courts which have dealt with the basic issues involved in this proceeding.

3. THE WEIGHT OF AUTHORITY AND THE BEST INTERESTS OF THE COMMUNITY SUPPORT THE VALIDITY OF THE COMMISSION'S ORDER AT ISSUE IN THIS PROCEEDING.

In *Pennsylvania Railroad Company v. Towers*, 126 Maryland 59, 94 Atl. 330, the power of the State Commission to establish rates after having once established a maximum fare was squarely at issue; it was claimed that the State Commission had thereby exhausted its authority and could not make different rates under different conditions. The court says the contention of the plaintiffs may have been in this regard "that while it might be within the power of the legislature and therefore by delegation, within the power of the Public Service Commission, to regulate and establish the single rate fare, yet when it had done so, it had exhausted its power and could not thereafter make any regulation whatever to affect either mileage or commutation rates, and for this claim there is warrant to be found in the language used in the decision of the *Lake Shore & Mich. So. Ry. v. Smith*, 173 U. S. 684, in which Mr. Justice Peckham elaborately discusses the question of the validity of an act of the Michigan Legislature, which was intended to regulate the price of 1,000-mile tickets, and holds that in attempting so to do the Michigan Legislature had exceeded its powers." (*Id.*, 94 Atl. Rep. 332.) Upon referring to the several decisions, the Court said:

"It was contended in argument on behalf of the Public Service Commission that, while not in terms overruled, the effect of the decision in the *Lake Shore* case, *supra*, had been very much weakened, if not entirely done away with, by other and later decisions. Since the argument of this case, however, the Supreme Court of the United States has rendered opinions in three cases, which clearly show

that in the view of that Court the decision in the Lake Shore case is still in full force." (*Id.*, 94 Atl. 333.)

However, after reviewing these decisions the Maryland Court concludes "From these citations it will be apparent that the limitations placed upon legislative action do not go to the extent of saying that the establishment by state authority of a maximum single rate exhausts the power of state regulation, or that there may not be different rates for different characters of service." (*Id.*, 94 Atl. 335.)

Upon appeal to the Supreme Court of the United States, the same leading issue was discussed and decided.

In the Towers case, (*Pennsylvania R. v. Towers*, 245 U. S. 6), the basic question we have at issue was tersely stated by the Court in the following words:

"The question, as counsel for plaintiff in error states it, is whether a state legislature, either directly or through the medium of a public service commission, under the guise of regulating commerce, may compel carriers engaged in both interstate and intrastate commerce to establish and maintain intrastate rates at less than both the interstate and intrastate standard and legally established maxima. It is asserted that there is no constitutional authority to compel railroad companies to continue the sale of commutation or special class tickets at rates less than the legally established standard or normal one-way single passenger fare upon terms more favorable than those extended to the single one-way traveler." (*Id.*, 9.)

The Court through Mr. Justice Day then proceeds to outline the position of counsel for the carrier:

"To maintain this proposition plaintiff in error relies upon and quotes largely from the opinion of

this Court in *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684. In that case a majority of this court held a statute of the State of Michigan to be invalid. A previous statute of the state had fixed a maximum passenger rate of three cents per mile. The statute in controversy required the issuing of mileage books for a thousand miles, good for two years, at a less rate. This Court held that a maximum rate for passengers having been established, that rate was to be regarded as the reasonable compensation for the service, and that the fixing of the less rate to particular individuals was an arbitrary exercise of legislative power and an unconstitutional interference with the business of the carrier, the effect of which was to violate the provisions of the Fourteenth Amendment to the Federal Constitution by depriving the railroad company of its property without due process of law and denying to it the equal protection of the law.

"The Lake Shore Case did not involve, as does the present one, the power of a state commission to fix intrastate rates for commutation tickets where such rates had already been put in force by the railroad company of its own volition, and we confine ourselves to the precise question presented in this case, which involves the supervision of commutation rates when rates of that character have been voluntarily established by the carrier. The rates here involved are wholly intrastate. The power of the states to fix reasonable intrastate rates is too well settled at this time to need further discussion or a citation of authority to support it.

"In *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, this Court held that a 'party rate ticket' for the transportation of ten or more persons at a less rate than that charged a single individual did not make a discrimination against an individual charged more for the same service, or amount to an unjust or unreasonable discrimination within the meaning of the Act to Regulate Commerce. In the course of the opinion the right to issue tickets at reduced rates good for limited periods upon the

principle of commutation was fully recognized. See pp. 277-280.

"Having the conceded authority to regulate intrastate rates, we perceive no reason why such power may not be exercised through duly authorized commissions and rates fixed with reference to the particular character of the service to be rendered.

"In *Norfolk & W. R. Co. v. Conley*, 236 U. S. 605, 608, * * * after making reference to *Northern P. R. Co. v. North Dakota*, 236 U. S. 585, this Court said:

"It was recognized (in the North Dakota case), that the state has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services."

"That the state may fix maximum rates governing one-way passenger travel is conceded. Having the general authority to fix rates of a reasonable nature, we can see no good reason for denying to the state the power to exercise this authority in such manner as to fix rates for special services different from those charged for the general service. In our opinion the rate for a single fare for passengers generally may be varied so as to fit the particular and different service which involves, as do commutation rates, the disposition of tickets to passengers who have a peculiar relation to the service."

The Court outlines the differences in service due to the lower cost of labor in making and selling a ticket of 100 rides, the commuter traveling many times for short-distances, and the public policy involved in the building up of suburbs dependent in part upon these commutation fares.

"After such recognition of the propriety and necessity of such service, we see no reason why a state

may not regulate the matter, keeping within the limitation of reasonableness."

The Court then makes an extract from a New York decision (*People v. Public Service Commission*, 159 App. Div. 531, 145 N. Y. Supp. 503), in which there is an extended review of the decisions dealing with this issue which is also pertinent to the present inquiry. The New York Court said in part:

"The law at issue 'empowers' the Commission to fix reasonable and just rates for such service. It is urged, however, that the statute is invalid under the rule of *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565. In that case the statute of Michigan had fixed a maximum passenger rate at three cents per mile. A subsequent enactment required the issuing of mileage books for 1,000 miles, good for two years, at a less rate. The court held that having fixed a uniform maximum rate as to all passengers, such rate was the reasonable compensation for the service, and that the fixing of a less rate to particular individuals was an unreasonable and arbitrary exercise of legislative power; that it was not for the convenience of the public and thus within the police power, but was for the convenience of certain individuals who were permitted to travel upon the railroads for less than the reasonable rate prescribed by law; that the law was, therefore, in violation of the Fourteenth Amendment of the Federal Constitution in depriving the company of its property without due process of law and by depriving it of the equal protection of the laws:

"In *Beardsley v. N. Y., L. E. & W. R. Co.*, 162 N. Y. 230, the Court of Appeals felt constrained by the *Smith* case to declare the Mileage Book Law of this state invalid as to companies in existence at the time of its passage, but in *Purdy v. Erie R. Co.*, 162 N. Y. 43, that law was held valid as to companies organized after the statute was passed.

"In *Louisville & Nashville R. Co. v. Kentucky*, 183 U. S. 503, after citing the *Smith* case and like

cases, the court says (at p. 511): 'Nor yet are we ready to carry the doctrine of the cited cases beyond the limits therein established.'

"In the Minnesota Rate Cases (*Simpson v. Shepard*), 230 U. S. 352, the legality of an order of the Commission of that state was recognized which fixed a maximum freight rate and passenger rate, the latter at 2 cents a mile, as the maximum fare for passengers twelve years of age or over, and 1 cent a mile for those under twelve years of age.

"In *Interstate Consol. Street R. Co. v. Massachusetts*, 207 U. S. 79, * * * the Massachusetts law prescribing special rates less than the maximum for school children was held valid. These cases indicate that the Smith case is not to be extended beyond the facts upon which it rests.

"The Smith case distinguishes itself from this case where the court (at p. 693) says: 'This act is not like one establishing certain hours in the day during which trains shall be run for a less charge than during the other hours. In such case it is the establishing of maximum rates of fare for the whole public during those hours, and it is not a discrimination in favor of certain persons by which they can obtain lower rates by purchasing a certain number of tickets by reason of which the company is compelled to carry them at the reduced rate, and thus, in substance, to part with its property at a less sum than it would be otherwise entitled to charge. The power to compel the company to carry persons under the circumstances as provided for in this act, for less than the usual rates, does not seem to be based upon any reason which has hitherto been regarded as sufficient to authorize an interference with the corporation, although a common carrier and a railroad.'

"Our flourishing cities owe their position and prosperity, in part, to the commutation rates for suburban service; the health and welfare of the public are concerned that people doing business in large cities may live in the country where the surroundings are pleasanter, more healthy and to the advan-

tage of themselves and their families. It is a known fact that such rates exist upon all railways entering large cities, and have usually been established by the companies voluntarily in the interest of themselves and the public. The service is different in its nature from the other passenger service. It is so universal, of such large proportion, has become so necessary to the public that it cannot be said that the fixing of reasonable and just rates for it is unusual or unreasonable, or the granting of a benefit to individuals and not for convenience to the public." (*Id.*, 9-15.)

Public policy constituted an important factor in the New York case.

Mr. Justice Day then cites the Commutation Rate Case, 21 I. C. C. 428, wherein "the authority of the Commission to fix reasonable rates was sustained." An extract from the Commission's opinion distinguishing that case from the Lake Shore Case was quoted; and the court concludes:

"The reasoning of these decisions is sound and involves no violation of the Federal Constitution. True it is that it may not be possible to reconcile these views with all that is said in the opinion delivered for the majority of the court in the case of *Lake Shore & Michigan Southern Ry. Co. v. Smith*, *supra*. The views therein expressed which are inconsistent with the right of the states to fix reasonable commutation fares when the carrier has itself established fares for such service, must be regarded as overruled by the decision in this case." (*Id.* 17.)

A subsequent appraisal of the situation has been made by a Federal court, as follows:

"If there was ever any doubt of the right of such a commission to fix a rate for a particular service under special conditions at a figure less than the maximum allowed for such general service (*Lake Shore Railroad v. Smith*, 173 U. S. 684, 693, 19 Sup.

Ct. 565, 43 L. Ed. 858), that doubt cannot survive the decision in *Pennsylvania Railroad v. Towers*, 245 U. S. 6, 17, 38 Sup. Ct. 2, 62 L. Ed. 117, L. R. A. 1918C, 475." *Tennessee v. U. S.*, 284 Fed. 371, page 375.

The principle of the Lake Shore case was invoked by a railroad company in a case entitled *The Southern Railway Company v. Atlanta Stove Works*, 128 Ga. 207. The court held the Lake Shore case was not in point. While not dealing specifically with this case in the following extract, the language of the court explains very aptly the power of a commission to deal with economic and industrial conditions.

"We recognize the carrier's right to manage its internal affairs by reducing its tariff below the commission rate, and that such low rate affords no basis for an arbitrary reduction of the commission's maximum standard to the voluntary low rate of the carrier. But we do contend that the commission, in the discharge of its duty to fix reasonable rates, is not precluded from the consideration of economic conditions recognized by the carriers in the conduct of their business. The full purpose of the creation of the commission would be thwarted if it could not consider and act on every economic or industrial factor potentially influencing the operation of a railroad and the transportation of freight. It cannot act arbitrarily, nor by edict produce abnormal conditions of trade; it cannot display favoritism by capriciously giving preferential rates to one locality which are denied to another. It may, however, recognize the traffic conditions between given points, and adjust its schedule to meet these conditions. If this is done in good faith, and upon sufficient reason, the rate fixed for the special conditions would not be discriminatory, because not applied to other localities, where the special conditions do not exist. Circular 309 does not discriminate against persons or classes of persons by charging one a greater or less rate for the same service than is charged for

all other persons similarly situated. It is an adaptation of rates to meet certain economic and industrial conditions in certain localities."

A case that has attracted much attention in the various decisions is entitled *Massachusetts v. Interstate Consolidated Street Railway Co.*, 187 Mass. 436, 73 N. E. 530; 11 L. R. A. (N. S.) 973. Concerning the particular issue in which we are here interested the court cited the Lake Shore case as holding that ordinarily the legislature has not the power to compel an exception from the ordinary rates in favor of a certain class of citizens. However, the Massachusetts court proceeded to say:

"If the difference is founded on a reasonable distinction in principle such discrimination does not deny the equal protection of the laws. Opinion of Justices, 166 Mass. 589, 34 L. R. A. 58, 44 N. E. 625; *Pacific Exp. Co. v. Siebert*, 142 U. S. 339, 35 L. Ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 92, 45 L. Ed. 102, 103, 21 Sup. Ct. Rep. 43." (*Id.* 11 L. R. A. N. S. 973, 977.)

This is an extract from the opinion of the Massachusetts Supreme Court considering the constitutionality of a statute requiring the carrier to haul school children at half fare. The reasoning of the court upon this issue is quite suggestive:

"In this case the selection of a class is not entirely arbitrary. The education of children throughout the Commonwealth is a subject for legislation which has occupied the thoughts of our lawmakers from early times. The duty of legislatures and magistrates to be diligent in the promotion of education, among all the people, is specially declared in Chap. 5, §2, of the Constitution of the Commonwealth. Compulsory attendance of children in the schools is provided for by our laws. Rev. Laws, Chap. 44, §1. Money may be appropriated by cities and towns

for conveying pupils to and from the public schools. Rev. Laws, Chap. 25, §15. It cannot be said that the legislature may not concern itself with the transportation of children to the public schools in the interest of popular education, just as it provides such children with books and other necessary articles. Rev. Laws, Chap. 42, §35. So far as this statute merely gives help to these pupils in connection with their acquisition of knowledge in the schools, it is justified. As a police regulation in the interest of education, the law may well require street railway companies to permit these children to ride to school upon their cars, without profit to the companies, provided it can be done without causing them loss. But if such a requirement involves expense, the cost can only be put upon the general taxpayers. It cannot be imposed upon the street railway companies, or upon that part of the public which pays fares to street railway companies. If, therefore, it plainly appeared that the enforcement of this section would cause expense to street railway corporations, which they must bear themselves, or put upon other classes of passengers in the form of increased fares to make good the loss from carrying school children at half rates, we should be obliged to hold that there was a taking of property without due process of law, through unconstitutional discrimination.

"We are, therefore, brought to the inquiry whether it was possible for the legislature to conclude that this provision would entail no loss upon the street railway companies. Was it not possible for legislators to decide that pupils, in most cases, go to and from the public schools at hours when the cars are not in use by persons going to and from their work, or by many persons; that the pupils generally are of such age and size as not individually to occupy nearly so much space as other passengers; that the difference between full fare and half fare is of such importance to the parents of many of these pupils, that the number who would ride at the half rate, would be nearly if not quite twice as many as at the regular rate; and that for these and other rea-

sons, railway companies would suffer no loss from carrying the children at half the regular fare? Unless we can say as matter of law that such a view would be untenable, we cannot hold that the statute is unconstitutional. Nothing less than a certainty that the provision would cause loss to the railway companies, or to some of them, would enable us to hold that the legislature was powerless to make the requirement. The question is difficult and doubtful. It involves the consideration of facts which primarily are for the law-making power. All presumptions are in favor of the validity of legislation. The evidence offered by the defendant had no tendency to show that it would suffer loss by carrying these pupils at half the regular rates. For all that appears, it would be in better financial condition at the end of a year, if it carried the children in compliance with the statute, than if it did not carry any of them. We hesitate to say that our lawmakers could not pass the act as one which would put no financial burden upon anybody.

"It has come to our notice in former cases, that before this statute was passed, similar conditions were sometimes imposed by towns in connection with grants of locations, and were accepted with seeming willingness by the railway corporations.

"We are of opinion that the law is constitutional." (*Id.*, 977, 978.)

The decision of the Massachusetts Court was sustained by the Supreme Court of the United States in *Inter-state Cons. St. Ry. Co. v. Mass.*, 207 U. S. 79.

This Court affirmed the Massachusetts Court not on the issue of the constitutionality of the act, but because the company had accepted its charter "subject to all the duties, liabilities and restrictions set forth in all general laws now or hereafter enforced relating to street railway companies" and so forth, and therefore the company was bound by it in the opinion of the Supreme Court. Mr.

Justice Holmes, however, for himself, discussed the constitutionality of the act; and Mr. Justice Harlan concurred in holding the law constitutional, as not denying equal protection of the laws or taking property without due process of law. Mr. Justice Holmes concurred hesitatingly because of the revenue feature.

"The objection that seems to me, as it seemed to the court below, most serious, is that the statute unjustifiably appropriates the property of the plaintiff in error. It is hard to say that street railway companies are not subjected to a loss." (*Id.*, 86.)

The Justice refers to the conventional fare of 5 cents adding:

"Whatever fare, the statute, fairly construed, means that children going to or from school must be carried for half the sum that would be reasonable compensation for their carriage if we looked only to the business aspect of the question." (*Id.*, 86.)

In this discussion there is not a suggestion of the argument of counsel for the carriers in this case, that such legislation is unconstitutional because of discrimination between classes. The revenue issue, the question of confiscation, was the factor that caused the hesitation on the part of the Justice.

The case was followed as a precedent in *Fitzmaurice v. New York, N. H. & H. R. Co.*, 192 Mass. 159, 6 L. R. A. (N. S.) 1146, 116 Am. St. Rep. 236, 78 N. E. 418.

The principle of the Massachusetts case was followed in *San Antonio Traction Co v. Altgelt*, (Tex. Civ. App.) 81 S. W. 106, which was affirmed on appeal in 200 U. S. 304, 50 L. ed. 491, 26 Sup. Ct. Rep. 261. The Texas law was similar to the Massachusetts statute. The company

did not raise the issue in its pleadings that the reduction would seriously impair its revenues.

A city ordinance in Richmond, Virginia, requiring the school children to be carried at a reduced rate, was contested rather as to the interpretation of the ordinance than as to its legality. The ordinance was sustained in *Northrup v. Richmond*, 105 Va. 335, 53 S. E. 962.

In the Commutation Rate Case, 21 I. C. C. 428, decided in 1911, these issues and most of the cases in point were extensively considered by the Interstate Commerce Commission. A commutation ticket has certain basic similarities to a scrip coupon ticket. The distinguishing characteristic is that the commutation ticket is usually applicable between two points only, in conjunction with many other short hauls of like character close to some large city, while the scrip coupon ticket is applicable generally throughout the United States, or some large portion of the same. The elements of similarity are that both tickets provide rates lower than the ordinary single trip charge; that the users of both of these tickets travel in the same cars, and in the same trains as those paying the full fare on each trip, and that both are justified on the grounds of public policy and because of the larger volume of travel than that of the average person paying the full fare, thereby reducing the cost per unit.

Commutation fares were in force by the carrier prior to the order by the Commission. The matter in controversy in the Commutation Rate Case, *supra*, was described as follows:

“Where, as in this case, the sole substantial question is as to the reasonableness of the commutation fares offered by a carrier to the suburban communi-

ties which it serves, it is contended that the carrier is not accountable to the Commission under the act to regulate commerce so long as such fares are not in excess of its maximum full fares between the same points for its general passenger service, provided the latter are in themselves reasonable. It is insisted that a carrier fully meets its obligations to the public by establishing a reasonable fare for a single one-way passage, and that it cannot be compelled to carry the public or any part of the public at a wholesale or lower fare than is reasonable for a single one-way journey; but that it may, at its pleasure, and without interference by the Commission, sell transportation at certain times, or to certain points, or in a certain quantity, at less than the normal fare, provided only that such special fares are open to all persons who may wish to take advantage of them." (*Id.*, 432.)

Among the many cases cited and discussed in the Commutation Rate Case, we find both the Party Rate Case and the Lake Shore Case, involving the Michigan Statute as to mileage books.

The real matter at stake in the Commutation Rate Case is very similar to the principle we have under consideration at the present moment. The Commission described the issue very definitely:

"If the normal one-way fare between two points is itself reasonable for the service performed on a one-way journey, is the Commission excluded by the terms of Section 22, as is contended, from the consideration of the question whether under Section 1 the lower commutation fare is a reasonable charge to make for the daily service back and forth between the same points?" (*Id.*, 437.)

Concluding its discussion of the subject the Commission held:

"In *Interstate Commerce Commission v. B. & O. R. R. Co.*, 145 U. S. 263, it is intimated that in fram-

ing the act to regulate commerce the Congress did not intend to ignore the principle that one can sell at wholesale cheaper than at retail. * * * This being so, we see no reason why the reasonableness of the fares demanded for the service may not be looked into by the Commission under Section 1." (*Id.*, 443.)

The Commission held it had jurisdiction over the subject. This decision has never been successfully attacked and it has been constantly used as a precedent establishing a basic principle in commerce practice. If the establishment of lower than maximum ordinary passenger fares in and of itself creates an unlawful discrimination this conclusion could not have stood the test. At the present time the carriers have in effect interchangeable mileage scrip books, and the Commission, in the absence of any additional legislation, might have prescribed reasonable fares. But in addition to that we have the additional statutory requirement that the Commission shall prescribe such fares.

The Commission makes the following statement relative to mileage books :

"It seems to be settled under that section (22) that a carrier may enter upon the policy and practice of issuing mileage books and excursion tickets at less than its regular normal fare for the one-way journey, and, having adopted such a policy, may subsequently withdraw from it and refuse longer to issue such tickets." (*Id.*, 437.)

This comment of the Commission in the Commutation Rate Case was made, of course, prior to the amendment involved in this proceeding.

If it be claimed that the comment of the Commission went to the constitutionality of such a law, it may be

added that the Commission made a similar comment previously as to both party rate tickets and as to commutation tickets. We shall discuss the party rate matter later. In *Sprigg v. B. & O.*, 8 I. C. C. 443, the claim of the complainant was that if a carrier has sold commutation tickets for a considerable period, it may be compelled to continue to sell them at less than the general public fares. Concerning this claim, the Commission stated:

"There is no legal basis for such a contention. If we had full rate-making power as ample and complete as that possessed by the Congress, we could not make such an order. We could in that case prescribe a rate which would be reasonable for everybody to pay * * * but we could not under any circumstances compel the granting of a special and lower rate for the benefit of a particular class." *Sprigg v. B. & O. R. R. Co.*, 8 I. C. C. 443, 452, 453.

And yet in the Commutation Rate Case, the Commission, citing this very paragraph ruled directly to the contrary. The attitude of the carriers and their closely knit compact organization, with the natural consequences thereof, have compelled this gradual expansion of the jurisdiction of the Commission.

Referring to the *Sprigg* case, the Commission said:

"The report in the case seems to have been understood as a denial by the Commission of its authority to control Commutation Fares." (*Id.*, 435.)

At that time (in 1900) "the commission was without authority to enter an order fixing a reasonable rate for the future." (*Id.*, 436.)

Summing up the decision in the *Sprigg* Case, the Commission said:

"On the whole, we are unable to regard the case as decisive of the question now before us, and, so far

as it conflicts with the conclusions here reached, must be understood as now being overruled." (*Id.*, 436.)

Prior to the enactment of the law here under consideration it is possible that the Commission did not have the affirmative authority to require scrip book coupon tickets to be issued at reasonable rates. A development of the law on this and kindred subjects has been along the lines of granting adequate power to the Commission to care for the interests of the public in a reasonable manner.

The decision of the Court in the Towers case, *supra*, and the decision of the Commission in the Commutation Rate Case, *supra*, have been based upon the facts there involved, which included the existence of commutation fares at the periods when the decisions were rendered. In other words the Court and the Commission did not go to the extent of saying that in the absence of any commutation fares being charged by the carriers the Commission or the state would have the power in the first instance of requiring the establishment of such fares. However, they have not held the Commission lacked the power to make such orders. That issue was simply undecided and was unnecessary to be decided upon the records presented.

In the Commutation Rate Case the Commission expressed it as follows:

"A carrier that has not undertaken a commutation service may possibly not be compelled to do so under the present law; that question is not before us and is not therefore considered."

That case, however, was decided on the basis of the law as it was then worded and did not involve the constitutional issue. Since then we have this amendment to Sec-

tion 22 of the Act under which the present order was entered.

In freight traffic at no time, to our knowledge, has the Court or the Commission ever held that the Commission lacked the power to require a commodity rate to be established. Class rates prevailing as the standard ordinary charge for the movement of the many different articles shipped may be modified at any time by the Commission ordering the establishment of a commodity rate, provided the facts and circumstances warrant the same. The power exists, the sole question being the reasonableness of the exercise of that authority. Likewise as to passenger traffic, once the statute is enacted, certainly the power exists.

The Party Rate case, 145 U. S. 263, 36 L. ed. 699 has been pivotal in the handling of this subject, involving the justice and reasonableness of the establishment of lower than standard fares. The Interstate Commerce Commission held 'that so-called party rate tickets, sold at reduced rates, and entitling a number of persons to travel together on a single ticket or otherwise, are not commutation tickets within the meaning of Section 22 of the Act to Regulate Commerce, and that when the rate at which such tickets for parties are sold is lower for each member of the party than rates contemporaneously charged for the transportation of single passengers between the same points, they constitute unjust discrimination, and are therefore illegal.' .

The Commission ordered the Baltimore & Ohio Railroad Company to cease and desist from charging lower rates for persons traveling together in one party than those contemporaneously charged by the same carrier for the transportation of single passengers between the

same points. But their conclusion was not sustained by the Supreme Court. In freight traffic, for many years, all have recognized the propriety of adjusting rates on different commodities or on the same commodity in accordance with the circumstances and conditions surrounding the traffic.

The propriety of applying the same basic principle to passenger traffic was fully recognized by the Court reviewing the action of the Commission in the Party Rate Case.

"It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable. For instance, it would be obviously unjust to charge A a greater sum than B for a single trip from Washington to Pittsburgh; but if A agrees not only to go but to return by the same route, it is no injustice to B to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially similar, as required by Section 2 to make an unjust discrimination." *Interstate C. C. v. B. & O.*, 145 U. S. 263, 36 Law ed. 703.)

Specifically as to mileage tickets the Court said:

"In other words, whether the allowance of a reduced rate to persons agreeing to travel one thousand miles or to go and return by the same road is a 'like and contemporaneous service under substantially similar conditions and circumstances' as is rendered to a person who travels upon an ordinary single trip ticket. If it be so, then, under state laws forbidding unjust discriminations, every such ticket issued between points within the same State must be illegal. In view of the fact, however, that every railway company issues such tickets; that there is no reported case, state or Federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public, it would seem that the

issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons traveling upon them." (*Id.*, 279.)

The Court even went further than is usual in freight rate cases in declaring that no such injury would result from the establishment of the lower basis of rates as to passenger traffic which might result in a similar action as to freight traffic:

The Court, in this case, quoted from several English decisions in support of the doctrine adopted. The underlying principle of the cases, is that in order to constitute unjust discrimination, it must be "for a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." (*Id.*, 281.)

In closing the Court says:

"In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike under the same conditions and circumstances, and that any fact which produces an inequality of condition and a change of circumstances justifies an inequality of charge. These traffic acts do not appear to be as comprehensive as our own, and may justify contracts which, with us, would be obnoxious to the long and short haul clause of the Act, or would be open to the charge of unjust discrimination. But so far as relates to the question of 'undue preference,' it may be presumed that Congress, in adopting the language of the English Act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. *McDonald v. Hovey*, 110 U. S. 619. * * *

"Upon the whole, we are of the opinion that party rate tickets, as used by the defendant, are not open to the objections found by the Interstate Commerce Commission, and are not in violation of the Act to

Regulate Commerce, and the decree of the court below is, therefore, affirmed." (*Id.*, 284.)

If certain of the doctrines of the Lake Shore decision, not necessary to the determination of the issues then presented, had prevailed, the hands of the government would have been tied, and the United States, short of a constitutional amendment, would have been helpless in regard to a large volume of public service that vitally concerns the welfare of the community.

In an old Pennsylvania case the distinction between a lawful and an unjust discrimination was very accurately expressed in the language of a referee, Mr. Paul Peter. The law was ably stated in accordance with the best thought that has gradually permeated the decisions of the Supreme Court and of the state courts.

The following contains an extract from the report of the said referee quoted in a subsequent decision of the Supreme Court of Pennsylvania:

"I regard it, then, as settled law in this state that a railroad company, a common carrier, owes a duty of equality to every citizen; and I adopt the position taken by Mr. Bullitt in argument that railroad companies have no right to make any undue discrimination or preference in their charges, and a charge made to one shipper higher than another, for the same service, under like circumstances, constitutes undue preference and discrimination, and, by consequence, renders the charge unreasonable.

"Such is the general rule, and it is vastly important to the general public that there be no undue relaxation of this rule; for, exercising, as they practically do, a monopoly of transportation on their roads, railway managers have in their hands a tremendous power, by discrimination, to enrich one man and ruin another. The equality, however, which is thus prescribed is not a strict and literal equality

under all circumstances, however varying and different. It is rather an equality in the sense of freedom from unreasonable discrimination. It is only unjust, undue, or unreasonable discrimination against which the law has set its canon. Arbitrary discrimination is illegal; is discrimination made with a view of giving advantage to one person. But the truism that circumstances alter cases applies here, and under a different state of circumstances a discrimination may be reasonable and lawful, which, were the circumstances the same, would be undue and unreasonable. In order to render lawful an inequality of charge, the goods must be carried under different circumstances, and the question whether the difference is material or essential arises in each particular case.' The writer regards the foregoing as the most precise and the most felicitous expression of the law upon the general subject under consideration that he has met with, and therefore quotes it entire." *Hoover v. Pennsylvania R. Co.*, 156 Pa. 220, 22 L. R. A. 263, 270, 271.

The Lake Shore case is a precedent for the doctrine that a state cannot establish unduly discriminatory rates for any class of citizens. But it is not a precedent for the doctrine that either the State or Federal Government cannot establish reasonable maximum rates of charge for services of a railroad company varying with the circumstances and conditions surrounding those services. Such a principle would invalidate nine-tenths of the decisions of the Interstate Commerce Commission which have stood the test of experience and the review of the courts for many years.

INTERCHANGEABLE SCRIP BOOK TICKETS ARE JUSTIFIED.

In the light of these decisions let us consider the lawfulness of the Commission's order, which is at issue.

As to passenger traffic a theory was advanced in the Lake Shore Case, which we have discussed at length, that only one rate can be established by government authority; then the government must keep hands off; and if there are any variations from that one rate the railroads, and the railroads alone, can make such variations. This is in striking contrast to the principles governing the regulation of freight traffic.

In the discussion of discriminations counsel for the carriers seem to imagine that any variation from a certain fixed rate per individual, per passenger mile, or per ton mile is an unjust and unlawful discrimination. There is no fixed ton mile revenue in existence, and there never has been such. Further we have seen there is no fixed passenger mile revenue in the United States. Such terms are misleading and confusing. Maximum rates are established on the various classes of both passenger and freight traffic in accordance with surrounding circumstances and conditions.

In the Party Rate Case, *supra*, which also applied to passenger traffic, the Court defined what constituted unjust discriminations in the following language:

"In order to constitute an unjust discrimination under Section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly by means of a special rate, rebate, or other device; but, in either case, it must be for a like and contemporaneous service in the transportation of a like kind of traffic, under substantially

similar circumstances and conditions.''' *Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., supra*, 281.

We have found the weight of authority sustains a fair, just application of this doctrine to both freight and passenger traffic.

It is said that making a fare for persons able to pay \$72 for a scrip coupon ticket lower than that accorded other single trip passengers, creates an unjust discrimination against those other travelers. We shall attempt to analyze the soundness of this, and to consider the facts which warrant the so-called classification attempted in this legislation, if it be such.

The carriers have claimed that the conditions surrounding the person compelled to pay 3.6 cents are analogous to, and the service is substantially the same as, the circumstances and conditions surrounding the haul of the party obtaining the lower rate under this order of the Commission. A somewhat elaborate discussion is presented on this issue by the carriers and some of the argument is referred to in the decision of the Commission under consideration.

There are certain basic differences amply sufficient to warrant the difference in charge.

The distribution of costs over a larger number of units is a factor of fundamental importance.

In order for a person to avail himself of the rate prescribed in the scrip book order he must travel 2,500 miles in a year.

The average individual in the United States, aside from those using this method of transportation, travels from 250 to 350 miles a year.

In other words, the minimum a party must travel in order to secure the scrip book rate is seven or eight times the average distance traveled by the rest of the people in the United States.

The basis for the foregoing proposition is as follows: The carriers estimate the total revenue from those who use the scrip books is \$300,000,000 at the present time. (Carriers' Brief, p. 85.) Dividing that \$300,000,000 by 3.6 cents, we have 8,333,000,000 passenger miles; and if each individual uses only the minimum mileage of 2,500, there would be 3,333,000,000 persons using these scrip books. Subtracting the 8,333,000,000 passenger miles from the total passenger miles estimated for the year 1922 (32,974,000,000—twice the travel for the first six months of 1922 *ante*, p. 10)—we have as a total miles traveled by the balance of the population, 24,641,000,000. Dividing this total by the balance of the population, the average travel per person is 230 miles. Allowing fairly for children or minors under various ages and eliminating such classes, this average journey of those who do travel, would be increased to about 300 to 350 miles per year.

Therefore the parties using scrip books furnish to the railroads on an average seven or eight times as much travel as the balance of the population averages.

If our entire population traveled on an average the amount those using the scrip books must travel as a minimum, the passenger revenues of our railroads would be multiplied many times. Here is a basic difference.

It has been urged that the excursionist and the traveller who attend fairs, conventions, etc., differ from the travellers who use these scrip books, that the former constitute a more particular class, and obtain a different

service from that of the ordinary traveler. We are told that the railroads can estimate with some degree of accuracy the volume of travel which they will obtain for a convention, or a fair, or for a given summer resort. There is some error, and some element of truth, in such claim. The element of truth therein is an argument against the position of the railroads in this case.

It is true that the railroads attempt to estimate the volume of traffic that they will have on a given excursion rate, which they quote at one-third or one-half of the prevailing rate. That very computation is for the purpose of finding out how many additional special facilities, special cars, special engines, and extra labor, will have to be furnished in order to take care of the traffic, all of which adds to their expenses. On the other hand, the parties who use these scrip books will gradually invade the cars and trains already scheduled to run. They do not require any more engines, or cars, or conductors, or trainmen; but those same cars being operated today gradually fill up with more passengers, and there is plenty of room, as evidenced by the fact that with practically the same equipment in 1919 and 1920 they handled 40 per cent more passenger miles. (*Ante*, p. 10.)

It is immeasurably better for the carrier to have this increased traffic developed in this manner that the scrip book will develop.

On the other hand the carriers are not able accurately to gauge the increased demands growing out of the quotation of special rates for tourists, excursionists, etc. It is a well known fact that the tourists may go in large or small volume. Many factors are involved. Over a period of six months that a summer excursion may last to the coast or to points west of the Missouri River,

passengers may or may not avail themselves of those special fares. When a special rate is charged to some political convention, or to some church convention, there may be a tremendous volume, requiring special effort to get the necessary equipment, and there may be congestion, such as in the Masonic gathering at Washington, D. C., recently. On the other hand the proposition may fall flat, and barely the minimum necessary to secure the rate will be supplied to the carrier; and the carrier will thereby be forced to have equipment which had to be provided to meet the expected crowd, remain idle. All this adds to the cost. Such instances are occurring constantly. They are matters of common knowledge.

There is another very important fact in connection with excursions, political conventions, church gatherings, etc., which serves to distinguish them from the traffic that is served by interchangeable mileage tickets.

There may be some reasons for reserving special fares to excursions, conventions, etc., more completely under the jurisdiction and control of the company. There are multitudes of details to consider in connection with them. They vary from time to time, and the competition of rival lines and rival cities is an important element in arriving at wise conclusions and policies. Such affairs are both local and temporary in character, while the use of these scrip books is state wide or national in character, and lasts the year round. These features may make possible a more efficient state or federal control over the scrip books than could be exercised readily over excursion fares, etc. At the same time the prevention of unjust discriminations in making special fares to excursions and conventions may require the occasional intervention by the government.

The carriers argue that mileage book fares were originally established as a competitive measure to induce merchants and manufacturers to patronize a road. The fact that competition was the original force causing the reduction in the charge does not constitute an argument against the reasonableness of the charge. With the carriers a solid unit under the sanction of the federal government making a universal passenger fare or freight rate, it would be natural for them to insist upon the highest possible charge that would still permit the traffic to move. It has been the force of competition that has created commodity rates. One road would establish a lower than the ordinary class rate, which would later be met or cut by another carrier. As a result a vast body of commodity schedules has been developed. That constitutes no argument against the reasonableness of the commodity rates so established. The fact is that those companies have by this process evolved a schedule of rates that meets in a way with the just needs of the manufacturing and shipping public, and moves the traffic. Likewise competition has served to develop just rates between rival cities. The fact that competition has been the driving force to develop the rate structure constitutes no argument against the reasonableness of that rate structure. The same factor has been present in the development of prices on everything we buy and sell, until the cost of the product reaches the level where the purchaser can and does buy.

The fact that a charge is the product of competitive forces does not prove or disprove its reasonableness.

It has been suggested that persons who would normally pay the standard fare will make use of this scrip book. The argument is so futile that it is hardly worth mention-

ing in passing. There is not a convention, or a fair, or a tourist excursion in the United States where there are not parties uninterested in the particular proposition who avail themselves of the reduced fare; these parties would otherwise pay the ordinary maximum fare.

Another argument as to the character of the service is that the person holding the scrip book rides in the same car and in the same train as the person not holding such book travels in; and yet one pays the 20 per cent reduced rate while the other pays the full 3.6 cent rate. That fact, stated by itself without the answer, may seem effective, but in the same breath the party making the statement should add—practically the same thing is true of every excursion, of every convention, of every tourist journey and of every commutation haul in the United States. The man going to the Presbyterian Convention at Philadelphia on his excursion fare is in the same car on the same train with the party paying his 3.6 cents. The man going to the Rockies for his summer holiday travels in the same train with the man paying his 3.6 cent fare. The person shipping a carload of coal has the commodity handled in the same train with a carload of livestock paying several times the same rate per ton mile. While that particular condition of the same car or the same train is analogous, other conditions are dissimilar; and those other factors are what justify the difference in the charge. It is true that we cannot separate the passengers going on the excursion rate from those paying the standard fare in the same train, and from a practical standpoint, how foolish it would be to make such a separation. Nevertheless, the creation of the convention fare and the excursion rate stimulates travel. That travel is substantially different

in character and in volume; and this is sufficient to warrant the difference in the charge, the one paying the standard and the other paying the reduced fare, although the two parties have the same conductor, the same brakeman, may sit in the same seat, and look out of the same window, and are served by the same roadbed. The suggestion that they are receiving the same service substantially, and therefore should pay the same rate is superficial, and does not get below the surface of things. If the fact that the passengers may look out of the same pane of glass, and sit on the same seat, etc., as other persons not interested in the excursion, is used as a justification for compelling the same rate, we could not have commutation fares, or tourist rates or conventions, or excursions in the United States. To eliminate these would be costly to the public; it would be costly to American industry, because they not only stimulate an increased movement, but they develop intercourse and commerce among the people.

Likewise, the commercial travelers of the country, and the people that are able to use the 2,500 mile ticket who are not commercial travelers getting the same fare, are similar to the man going to the convention, and the man going to the same city on business, who both use the same rate. That is an attendant incident, inevitable in character, that it is almost physically impossible to alter in the practical exigencies of the case.

The charging of a lower fare to those purchasing the mileage book, if it is not confiscatory in nature, does not work an injury to the parties who pay the higher fare. The contrast between this phase of the situation in the passenger travel, and the similar phase of the situation in freight traffic, is very marked. If one person in a

local community is charged a lower rate than his competitor in the same community for the shipment of the same commodity, that individual obtaining the lower freight rate can possibly drive his competitor out of business. The constant margin or handicap the party with the lower freight rate has in the handling of his goods increases as the volume of the goods which he handles increases. Therefore, the discrimination or difference in the freight charge has a powerful effect on business. On the other hand, a passenger who travels an average about 300 miles a year and is charged 3.6 cents per mile has a total cost per year of \$11 or \$12. A 20 per cent reduction would not stimulate or depress his business activities. On the other hand, to the large manufacturer or wholesaler having several score or several hundred traveling men throughout the nation, this would be of vital importance—both to the employer and the employe. It might mean thousands of dollars to a single enterprise. It might constitute the margin or difference between success and failure, between activity and idleness.

The fact that his neighbor, who travels 2,500 miles a year gets a lower fare than the party who travels 300 miles a year at a cost of \$10.80 can have no possible effect on the development of the business of the latter individual.

If the party receiving the scrip book and travelling his 2,500 miles is compelled to pay the higher fare, the other individual travelling the 300 miles has gained nothing.

One furnishes eight times the travel furnished by the other. All the overhead costs, all the general expenses, all the interest and return on investment in terminals and roadbed and equipment are less per unit for the larger amount of travel.

This difference in the effect on freight traffic and on passenger traffic of different rates and charges, and the resulting creation of unjust discrimination was expressed by the Court in the Party Rate Case many years ago, when it said:

"If for example a railroad makes to the public generally, a certain rate of freight and to a particular individual residing in the same town a reduced rate for the same class of goods, this may operate as an undue preference, since it enables the favored party to sell his goods at a lower price than his competitors, and may even enable him to obtain a complete monopoly of that business. Even if the same reduced rate be allowed to everyone doing the same amount of business, such discrimination may, if carried too far, operate unjustly upon the smaller dealers engaged in the same business and enable the larger ones to drive them out of the market.

"The same result, however, does not follow from the sale of a ticket for a number of passengers at a less rate than for a single passenger; it does not operate to the prejudice of a single passenger, who cannot be said to be injured by the fact that another is able in a particular instance to travel at a less rate than he. If it operates injuriously toward any one it is the rival road, which has not adopted corresponding rates; but, as before observed, it was not the design of the Act to stifle competition, nor is there any legal injustice in one person procuring a particular service cheaper than another." (Party Rate Case—*Int. Com. Com. v. B. & O.*, *supra*, 280.)

Referring to the lack of injury or damage to other individuals, the Court said as to party rate tickets:

"If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single trip passenger would gain absolutely nothing." (*Id.*, 281.)

HISTORY OF PASSENGER FARES.

A concise history of passenger traffic and the charges which have been collected by the carriers in the past, was contained in the decision of the Court in the Party Rate Case, *supra*.

The application of the postage stamp theory to the passenger traffic by the railroads did not come until we entered the World War in 1918. Many fares designed to meet the condition of different kinds of traffic were cancelled by the Director General when he took office. Some were restored almost immediately, while others have been gradually re-established. At the time of the enactment of the Interstate Commerce Law originally and ever since, up to 1918, it was customary for the carriers, in order to encourage increased travel, and with proper recognition of the relative volume of travel, to give rates lower than those to which the regular one trip tickets applied. The Court in the Party Rate Case, listed these various forms of traffic. It will be noted that the rates reduced have been restored on all of these different classes of traffic, with the single exception of that provided especially to meet the needs of the commercial traveler. The language of the Supreme Court is significant with respect to this situation:

“But, whether these party rate tickets are commutation tickets proper, as known to railway officials, or not, they are obviously within the commuting principle. As stated in the opinion of Judge Sage in the court below: ‘The difference between commutation and party rate tickets is, that commutation tickets are issued to induce people to travel more frequently, and party rate tickets are issued to induce more people to travel. There is, however, no difference in principle between them, the object in

both cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured.'

"The testimony indicates that for many years before the passage of the Act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, trips for long distances, and trips in parties of ten or more, lower than the regular single fare charged between the same points; and such lower rates were universally made at the date of the passage of the Act. As stated in the answer, to meet the needs of the commercial traveler the thousand mile ticket was issued; to meet the needs of the suburban resident or frequent traveler, several forms of tickets were issued. For example, monthly or quarterly tickets, good for any number of trips within the specified time; and ten, twenty-five or fifty-trip tickets, good for a specified number of trips by one person, or for one trip by a specified number of persons; to accommodate parties of ten or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for that purpose; to accommodate excursionists traveling in parties too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were also issued between cities where travel was frequent. In short, it was an established principle of the business, that whenever the amount of travel more than made up to the carrier for the reduction of the charge per capita, then such reduction was reasonable and just in the interest both of the carrier and of the public." (*Id.*, 279.)

With the party rate ticket at issue the Court has made the foregoing statement. With the scrip books at issue we should like to add, with due respect:

The differences between commutation, party rate and interchangeable mileage tickets are, that commutation tickets are issued to induce people to travel more fre-

quently; party rate tickets are issued to induce more people to travel; and interchangeable mileage tickets are issued to induce more people to travel more frequently. There is, however, no difference in principle between them, the object in all cases being to increase travel without unjust discrimination, and to secure patronage that would not otherwise be secured.

This great body of commercial and professional men of the country who will use this scrip book will stimulate travel. These commercial men are the emissaries of business. They are the men who furnish the bulk of the freight that the railroads haul. The drastic increase in passenger fares which forced thousands of traveling men to be retired to the idle class was one of the unfortunate events of recent history; this helped to bring on the commercial depression that we have passed through. Nobody is suggesting here that this was the controlling factor; but it was unquestionably a contributing factor of large importance, and it should be removed.

V. THE CARRIERS HAVE FAILED TO PROVE THAT THE REDUCED FARES ORDERED BY THE COMMISSION ARE NON-COMPENSATORY.

In order to overthrow this order of the Interstate Commerce Commission on the ground that the fares are confiscatory, the carriers have not gone to the trouble of ascertaining the expenses of the traffic under consideration; and they have not ascertained any actual or estimated value of the property devoted to this service.

On this record there is not even an approach to a showing that the fares ordered would be confiscatory, in accordance with the customary methods adopted in the many railroad and public utility cases that have come before this tribunal.

Before any order of a state or national legislative body or commission is overthrown on the ground that the rates are non-compensatory or confiscatory the usual course is to show the value of the property devoted to the service and the expenses of the traffic at issue, with the resulting net revenues applicable to that property. In the leading case of *Smyth v. Ames* (169 U. S. 466, 42 L. Ed. 819), a failure to make the proper segregation for state traffic was fatal to the complainant. This has been followed by many other decisions of like tenor.

THE RATES AT ISSUE PRODUCE A SUBSTANTIAL PROFIT
ABOVE EXPENSES.

While many references are made by counsel for the carriers to the confiscatory character of the rates, yet the only attempt on this record to substantiate the claim is a computation, based upon an erroneous premise. And the said computation involves no allocation of property to the traffic under consideration.

On pages 7 and 8 of their brief counsel for the carriers say:

"The Commission found that the operating ratio for passenger service at the standard rate of 3.6 cents per mile for the year 1921 was 85.24 per cent. That is, of every 3.6 cents, 85.24 per cent was required to pay operating expenses; in other words, that, for every mile for which the carriers received of a passenger 3.6 cents, it cost the carriers over 3.06 cents to transport him. The requirement that interchangeable tickets should be sold at a reduced rate equivalent to 2.88 cents per mile results in requiring the transportation of passengers riding on such tickets at a loss of more than .18 cents per mile."

In this computation carriers have referred to the "present standard rate of 3.6 cents," whereas we have seen that 75 per cent of the travel is carried today on rates which average 2.84 cents per mile.

In the foregoing computation the carriers assume that 85.24 per cent of every 3.6 cents was necessary in order to pay operating expenses. That assumption is based on an interesting misinterpretation of what the Commission held. Counsel say that the Commission found that the operating ratio for passenger service "at the present

standard rate of 3.6 cents per mile for the year 1921 was 85.24 per cent." That operating ratio was the average of all passenger traffic. If it were true that every passenger paid 3.6 cents per mile that application of the operating ratio would be correct. As a matter of fact, however, every passenger does not pay 3.6 cents per mile, as can very readily be demonstrated. Commissioner Daniels, in his dissenting report (77 I. C. C. 219), says that the gross passenger revenue for the first six months of 1922 was approximately \$500,000,000. In the opinion of the majority, at page 203, revenue passenger miles are shown to be 16,487,000,000 for the same period. Dividing one figure into the other produces an average per passenger mile of 3.03 cents instead of 3.6 cents. Applying the operating ratio of 85.24, which the record shows was for all passenger traffic, to 3.03 cents, produces an average expense per passenger mile of 2.58 instead of 3.06 cents as stated by counsel for the carriers. This computation based on the carriers' own figures discredits their argument of confiscation.

The absurdity of counsel's claim of operating expenses averaging 3.06 cents per passenger mile, is demonstrated by simply applying that cost to the total passenger miles during the first six months of 1922, as shown in the Commission's report at page 203—16,487,000,000. Multiplying these two factors we find a total operating expense for the passenger traffic of \$504,502,200; this is larger than the total passenger revenue for the six months in question, which, as previously stated, was approximately \$500,000,000.

In other words that claim of counsel that 3.06 cents is the average cost per passenger mile would produce an operating ratio of more than 100 per cent for the pas-

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senger traffic as a whole, whereas the Commission found the operating ratio to be 85.24.

If the cost were 3.06 cents on all branches of the passenger traffic, then every excursion hauled, and every commutation service rendered result in loss to the carrier.

This error on the part of railroad counsel is simply a mathematical mistake. There can be no issue between us as to basic figures, or what those figures purported to show.

Counsel for the carriers on page 84 of their brief before the lower court make a similar comment to that quoted above, in the following words:

"The order is void because it prescribes non-compensatory rates. The Commission, as stated above, found that for the year 1921 the passenger operating ratio of Class 1 roads was 85.24. This means that out of every dollar of passenger operating revenue 85.24 cents were spent to meet the cost of service." (Carriers' Brief, 84.)

The Commission never made a finding to that effect. There is a wide range in the handling of passenger traffic. Contrast the commutation service, which has received such extended consideration in the decisions, with the crowded passenger coaches going from the large cities to the suburbs, and the attendant special equipment, expedited movement, extra labor, expensive congested terminals at the great cities, expensive right of way in cities and suburbs, costly maintenance, overhead crossings, elevated tracks, etc., etc., which do not exist on a local movement of a passenger car out on a branch line, or on a main line of the same railroad far from any congested center, moving at ordinary speed, in a regular train.

But the large volume of traffic in the commutation service means that the company can handle that traffic on a smaller margin. The operating ratio might be 95 or more and there still be a substantial profit in the enterprise.

The comments just made as to commutation service apply equally to an excursion where the railroad has to put on extra equipment, moving empty passenger cars perhaps several hundred miles to a point where they are needed to accommodate crowds that are going on the excursion. Special trains have to be fitted up for that service, hours have to be changed and revised, new men employed, etc.

Contrast the cost of a crew handling an excursion train with the cost of a cheap coach on the end of a mixed freight and passenger train on a branch line. The variation in cost is very large.

The Commission's finding was that the operating ratio of 85.24 applied to the passenger revenues, as a whole. There is no foundation on this record for assuming that percentage also applies separately to each branch of the passenger service. To claim that this applies to every dollar, as phrased by counsel for the railroads, is an absurdity. It would be like finding the operating ratio in the freight traffic, and then deducing from that fact, that the operating ratio corresponds to that precise figure in the handling of coal, as well as in the handling of oil, or dry goods, or any other kind of specific traffic. Such an assumption is untenable. If a party were attempting to prove that the rates on coal are confiscatory, no court would listen to the claim that the operating ratio on all traffic showed the costs of handling coal.

We know from the record that the revenue from pas-

senger traffic in the Eastern district averages 3.03 cents per passenger mile. The record shows that the operating ratio in 1921 was 85.24, therefore we know that the costs averaged 2.58 cents per passenger mile.

The burden of proof rests on the carriers. They have established these figures, and they have not shown the cost averages any more on the passenger travel at issue, than on all passenger travel in the district. A cost of 2.54 cents per passenger mile compared to a revenue of 2.88 cents leaves a substantial profit of slightly more than 10 per cent. We cannot tell from the record what that would produce on the value of the property devoted to this traffic.

From the record we cannot determine with certainty that even these figures are accurate. We are dealing with averages on all passenger traffic, and not with actual cost of the traffic at issue.

The analysis of operating ratios instead of returns on value, will be a novel departure in the discussions on confiscatory rates.

**RATES MUST YIELD SOME SUBSTANTIAL PROFIT, AND THE
LAW DOES NOT REQUIRE THE SAME PROFIT ON ALL
TRAFFIC.**

The operating ratio on the passenger traffic is larger than the operating ratio on the freight traffic, but that proves nothing as to the relative desirability of, or profits from, the passenger traffic compared to the freight traffic.

The packers, with an operating ratio of over 95 per cent, have the reputation of being quite successful. The real issue is not what portion of the gross revenues can

be considered net profits; the question is, what is the ratio between those net profits and the value of the property devoted to that service? Ten per cent of the gross passenger revenue applied to the property devoted to the passenger service may produce twice as large a per cent of return on property, or one-half as large a per cent of return on property, as the 20 per cent of gross earnings in the freight business averages on the property devoted to the freight traffic.

The use of the roadbed has been frequently referred to as fairly apportioned between different classes of traffic in accordance with the ton miles and passenger miles using the same. Likewise, the use of terminals, it has been said, may fairly be reflected by the number of passengers and tons using the same. Unfortunately a ton of passengers compared to a ton of freight is not a very intelligible comparison. Frequently in railroad accounting it has been assumed that three passengers are equivalent to one ton of freight, not that the weight of the passengers is the test, but that the weight of the passengers plus the dead weight of the car necessary per passenger, and other extra expenses per passenger added, produce a total which justifies the ratio of 3 to 1 in the allocation of certain common expenses. The revenue from three passenger miles at 3.6 cents is 10.8 cents, compared to the revenue from a ton mile of freight traffic of from 1 to 1.4 cents. Here we see a revenue from the passenger traffic many times as large as that from the freight traffic.

It would be erroneous to assume that the operating ratio which was found to apply to passenger traffic as a whole also applied to the particular rates collected in each branch of the passenger traffic. It applies only

to the revenues collected from all the traffic in the aggregate. The operating ratio on commutation traffic, of course, would be much larger than the operating ratio derived from the 3.6 cents revenue. This is not improper. The carrier can well afford to handle a large volume of business on a small margin. The operating ratio on an excursion, where the cars are packed to the platform might be greater per individual, but here again the carrier can afford to handle the large volume at a small margin. The very large extra expense of furnishing the extra cars and engines and the labor of sidetracking other trains to make way for the excursion train, the extra clerical help, etc., all add to the expense, but those additional expenses are absorbed if the volume of traffic is large enough.

We repeat that it is erroneous to say that the Commission found the operating ratio applicable to the 3.6 cent fare was 85.24. No such finding can be secured from the statistical records of the Interstate Commerce Commission, and no citation of such authority is given by the carrier.

That is the operating ratio of all passenger traffic as a whole. It would be just as absurd for a railroad to try to impeach proposed freight rates on corn as being confiscatory, by claiming before the court that the operating ratio on all freight traffic was 80 per cent, and therefore a 25 per cent reduction in corn rates would be confiscatory.

It would be just as absurd to try to prove that John Smith is 5 ft. 10 inches tall by proving that that is the average height of all men; or, that Tom Jones is going to die at the age of 33 years, because that is the average life of all men.

An analysis of this passenger travel, independent of commutation, excursion and other special forms of travel, could have been made in the accounts of the carriers for a given period of 30 or 60 days on certain representative lines, and the probative force of such an analysis would have been quite persuasive. But the carriers did not see fit to undertake that task.

It would be wholly unfair to conclude that any particular revenue, whether from a specific class of freight, or from all freight, or from passenger traffic, or from the total business within a state, or from any other class of traffic, is confiscatory simply because of a certain operating ratio on all traffic. The controlling test is not the ratio of expenses to earnings, but the ratio of net earnings to property. That is the basis, the test used by this Court in the scores of cases that have come up to it involving the reasonableness of rates for public utilities and railroads in cities, towns and states from all over the nation.

Mr. Commissioner Prouty writing the opinion for the Commission in the Eastern Advance Rate Case of 1911, dealing with the application of the railroads for an increase in rates, discussed this factor of operating ratio in the following manner:

"The defendants have attempted to show that the cost of operation has increased and will increase in proportion to gross operating revenue. This is not the question. Even though the percentage of net to gross is less, still the total net may be more and the percentage of net to value may also be more. We are to determine whether the net return of these carriers upon the value of their property devoted to the public service will be sufficient without an advance in their rates." (*Advances in Rates, Eastern Case*, 20 I. C. C. 243, 275.)

It may be claimed that in a recent case the court did

base conclusions on an operating ratio. In *Norfolk & Western v. Conley*, 236 U. S. 605, the court held as follows:

"In making a reasonable adjustment of the carrier's charges, the state is under no obligation to secure the same rate of return from each of the two principal departments of business, passenger and freight; but the state may not select either of these departments for arbitrary control. Thus it would not be contended that the state might require passengers to be carried for nothing, or that it could justify such action by placing upon the shippers of goods the burden of excessive charges in order to supply an adequate return for the carrier's entire service. And, on the same principle, it would also appear to be outside the field of reasonable adjustment that the state should demand the carriage of passengers at a rate so low that it would not defray the cost of their transportation, when the entire traffic under the rate was considered, or would provide only a nominal reward in addition to cost." (*Norfolk & West Ry. Co. v. Conley*, 236 U. S. 605, 609, 610; 59 L. Ed. 745.)

In this case the operating ratio on passenger, mail and express traffic was found to be 97.42; and the leading witness for the state conceded that if the express traffic were eliminated the cost of the passenger traffic would be very close to 2 cents a mile, which was the total fare prescribed.

As previously shown, the fare of 2.88 cents compared to the cost of 2.58 yields a profit of over 10 per cent. There is quite a difference between a net of (100 less 97.42, or) 2.58 per cent, and a net of more than 10 per cent shown in this record. But the net of 2.58 per cent was not the final figure, because if express traffic were eliminated practically all of that profit would be ab-

sorbed, according to the admission of the leading witness for the state in that case. (*Id.* 614.)

The use of the operating ratio as a test of confiscatory rates has been in order to find whether or not there was any substantial profit and not if there was a profit, whether that was adequate.

The decision in the Conley case, *supra*, was rendered at about the same time, and was based largely upon *Northern P. R. Co. v. North Dakota*, 236 U. S. 585. In this case the distinction drawn between the facts there presented and those of *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, also serves to distinguish the Conley case from the present proceeding:

"The case of *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, involved a rate fixed by the Railroad and Warehouse Commission of the State of Minnesota for the intrastate transportation of hard coal in carload lots. There was no proof that the carrier was compelled to transport the coal at a loss or without substantial compensation. The principal testimony, as the court observed, was intended to show that 'if the rate fixed by the commission for coal in carload lots were applied to all freight, the road would not pay its operating expenses, although in making this showing the interest upon the bonded debt and the dividends were included as part of the operating expenses.' It was said that it was 'quite evident' that this testimony had 'but a slight, if any, tendency to show that even at the rates fixed by the commission there would not still be a reasonable profit upon coal so carried' (*id.* p. 266); and this conclusion effectually distinguishes the case from the one at bar." (*Northern P. R. Co. v. North Dakota ex rel.*, 236 U. S. 586, 601.)

The court in the North Dakota case, cites numerous cases calling for the segregation of expenses and value, where an attack is made on the rates applicable to a

portion of the traffic, rather than on the whole schedule. In the present case the only competent evidence of record demonstrates that the rates will produce substantial profits; but we are unable to determine the ratio of those profits to the value of the property devoted to the service. Under a subsequent heading we shall see that a substantial increase in revenues can reasonably be expected from these reduced fares, and that will farther augment the profits we have described.

VOLUME OF TRAFFIC AFFECTED.

There is some doubt as to the accuracy of the carriers' estimate that 30 per cent of the traffic will make use of the scrip book.

It is true that Mr. Clink and other representatives of the traveling men estimated 25 per cent of the traffic would be on scrip books, but that was based, first, on a reduced rate of $33\frac{1}{3}$ per cent, and second, on an increase in the volume of travel by that amount.

The Commission's finding as to the amount of traffic which was affected by the mileage tickets prior to Federal control, as stated in their report at p. 206, omits certain rather important clauses from the digest of this evidence made by the carriers. For example, where the Commission says "and at certain periods not less than 20 per cent of the total passenger revenue," etc., the words "on an average" are omitted as to the 20 per cent estimate. Further, the Commission omits the statement that in the Southeastern territory, where there was the largest reduction in the fare (amounting to 20 per cent),

the volume of traffic affected was about 20 per cent, all of which is shown at pp. 29, 31, 32, 91, 107, 220, 221, 385 and 386, on the record, as digested on pp. 14 to 16 of the carriers' brief before the Commission.

Twenty per cent would be a fairer reflection of the record based on the experience of the past, than 30 per cent. This would involve an error of one-third in amount in all the carriers' subsequent computations. However, for the purposes of this argument, we shall use the 30 per cent allowance.

The Commission adopts neither percentage specifically in its discussion of the record.

INCREASES IN PASSENGER TRAFFIC.

The general tendencies in passenger traffic were shown in evidence. The record justifies the claim that the proposed reduction in fares will be accompanied by a substantial increase in traffic.

The Commission expressed a fundamental truth when it said that other things being equal as prices are lowered sales increase. (Com. Dec. 209.)

Notwithstanding the enormous growth and development during the past few years, the constantly increasing passenger fare has retarded passenger traffic.

A reduction or an increase in the passenger fare has a powerful influence on the traffic. There is a delicate intimate relationship between the two. A striking illustration of that fact is the table presented in the decision of the Commission previously cited, on page 203. From

1916 to 1920 passenger miles increased more than 30 per cent,—from 34,500,000 to 46,800,000. The year 1920 was after the close of the war and was the year that witnessed the most phenomenal decline in prices in American history. It was the period of transfer of the railroads from government operation and control to private operation, a period of uncertainty in business generally. And yet, in 1920 we find a greater number of passenger miles than in any other year in American history.

The advance of 1918 in passenger fares was at or about the time of our entrance into the war, accompanied by a tremendous business activity. When the advance came again, in 1920, the burden was too heavy to carry. That portion of the passenger travel which had to pay 3.6 cents suffered an increase of 80 per cent over rates paid previously throughout large sections of the country. Passenger traffic then dropped severely, and there has been no subsequent reduction in passenger fares, although there has been in freight rates.

Two years later, in 1922, there were less than 33,000,000,000 passenger miles, according to the figures so far as this record shows; this was a less amount of passenger travel than existed in 1916; and a less amount, by 13,000,000,000 than existed in 1920.

From 1916 to 1920 the number of passengers per car increased 25 per cent—from 16 to 20 persons. In 1922 the number of passengers per car dropped down to 15—a lower average per car than existed six years previously, in 1916, and 20 per cent below the amount in 1919 and 1920.

The passenger traffic, due to the very nature of the loading and unloading by the individual himself, to the space in the car, and the physical situation, permits tre-

mendous expansion or retraction; and regardless of the physical facilities the volume of the traffic is exceedingly sensitive to commercial and other causes.

The carriers' reference to Section 15-A evidences a misconception of the purpose of the law, and of the purpose of the order at issue in the case. An advance in rates may decrease revenues. The rate reduction here at issue will increase revenues. After an extraordinary advance of the character made in 1920, if the Commission's hands were tied as to any further readjustments which the Commission would find warranted, Section 15-A would defeat itself.

AN INCREASE OF ONE PASSENGER PER CAR WOULD MORE THAN OFFSET THE ALLEGED REDUCTION OF \$60,000,000 IN GROSS PASSENGER REVENUES DUE TO THE ORDER OF THE COMMISSION.

Carriers claim the 20 per cent reduction ordered would affect present passenger revenues collected by 3.6 cent fares, aggregating \$300,000,000, thereby causing a reduction in revenues of \$60,000,000 annually. In this computation there is no allowance for increased traffic.. The Commission finds "that some additional traffic would be created by a scrip ticket at reduced fares may fairly be assumed, although it is impossible to determine how much." (Commission's decision, 209.)

During the first six months of 1922 the average passengers per car was 15. (*Ante*, p. 10.) One more passenger per car paying 2.88 cents per mile would produce in gross revenues an increase of \$63,302,400. (16,487,000,000 passenger miles multiplied by 2 produces 32,974,000,000 passenger miles estimated for the year. Dividing

that by 15, we have 2,198,000,000 car miles. Assuming one additional passenger per car at 2.88 cents per mile produce the total stated = \$63,302,400. For figures used here, see *ante*, p. 10.) An increase of 7 per cent in gross passenger revenues. (\$1,000,000,000—used to determine the 30 per cent of traffic affected—in carrier's brief before lower court; see page 85) would produce \$70,000,000 gross.

With these basic figures in mind let us review the claims of the carriers.

Counsel for the railroads stated before the lower court that the estimated loss of \$60,000,000 per annum was not questioned by the Commission in its findings. (Carriers' Brief, p. 94.) That same expression has been repeated at several other places in their brief and petition. As a matter of fact, the Commission did not mention that claim of the carriers in the text of the majority opinion, except as it is contained in a table prepared by the railroads and reproduced in the appendix attached to the decision without comment, as the claim of the railroads. Further, such a claim is based on the assumption that there is no increase in the traffic whatsoever, which is in conflict with the following findings of the Commission stated in its conclusion at page 209:

"It is a well-recognized rule in trade and commerce that, other things being equal, as the price of an article is lowered the sales increase. And the fact that for many years prior to Federal control carriers voluntarily sold mileage books at discounts ranging from 10 to 33½ per cent is not without significance. That commutation and excursion fares create traffic is conceded by carriers. That some additional traffic would be created by a scrip ticket at reduced fares may fairly be assumed, although it is impossible to determine how much." (Commission's decision, 209.)

The fact that the Court or Commission does not mention the claim of a party to the case, is very, very far from establishing the accuracy of that claim; in fact, it is usual to deduce a contrary conclusion from such an incident.

The carriers say in their Statement of Facts, "Whether the sale of such tickets will produce a larger volume of traffic the Commission finds to be wholly a matter of speculation." This comment does not fairly reflect the conclusions of the Commission as a whole. On the same page cited by counsel in the Commission's decision, page 209, we find the statement which we have quoted above.

The carriers have made an interesting series of approximations in order to determine their passenger expenses.

On page 23 of their brief before the lower court counsel make the claim that in order to offset their alleged loss of \$28,800,000 for the carriers parties to the case, occasioned by this reduction, it will be necessary for four million additional persons to travel; or, stated another way, one hundred thousand additional persons must each make forty journeys 250 miles each inside of a year. The figure 28,800,000 is simply an estimate based on the assumption that the loss of the railroads complainant will be on the same ratio as the alleged loss of sixty million is to the total revenue of one billion in the United States as a whole, or six per cent of the total revenues. The details of this computation are stated elsewhere by the carriers themselves in their brief. Consequently our computations will be made upon the figures for the country as a whole. Allowing these arbitrary percentages of apportionment in each instance would get the figures for

the railroads complainant just as accurately as they themselves have secured this figure, which is an estimate pure and simple and takes no cognizance of increased traffic, the relative density of traffic, the relative amount of traffic in this territory which would be affected by the order of the Commission, the actual passenger expenses of this class of traffic, etc., etc. This method of computation would be like a railroad within a state attempting to discredit an order of the state railroad commission by using the revenues of the railroads as a whole in the United States and finding some multiple to apply to the various national figures in order to get the state figures and then using this multiple on all factors. We do not believe that the Supreme Court would ever give serious consideration to such an attempt to nullify the orders of a state legislature or of a state commission. And yet that is precisely what the carriers in this brief have attempted to do as to one portion of the passenger traffic of the United States.

However, for the purpose of our computation, let us use the method adopted by the railroads in this case.

In order to discredit the possibility of the increased traffic offsetting this alleged loss the carriers then attempt to show the large volume of increased traffic which would be necessary to create the offset. Their methods of making this computation are quite ingenious. They assume that every additional passenger mile must have the same operating ratio as exists today. In other words, in their assumption, their premise, they have assumed the conclusion they are trying to demonstrate. By that process we are simply reasoning in a circle. If the character of the traffic we have under consideration were that of excursion, or tourist, or convention, or commu-

tation, or other traffic of that character where additional trains would be necessary to accommodate it, the reasoning might be justified. The kind of travel here under consideration has no such characteristic. This traffic will gradually invade the existing cars and trains. There will be no appreciable increase in expense. That fact is the very reason why the greater density or the greater volume added to an existing volume is of so much value to the railroads; and, on the other hand, the loss of that narrow margin has such a disastrous effect on the net of the railroads. The investment in roadbed and equipment and terminals have been made and the bulk of the expense has to go on whether the passengers travel or not.

An increase of 7 per cent in the passenger miles or an increase of one passenger per car in the United States would completely offset this sixty million dollars alleged loss. In other words, instead of having fifteen passengers per car as they did during the first six months of 1922, if they had sixteen passengers per car as in 1916, the sixty million dollars would be completely absorbed, even after allowing for some increased expenses that might be entailed.

On a subsequent page (24 of their brief) the carriers attempt to make the computation as to the amount of traffic necessary to offset the sixty million dollar alleged loss. They conclude with this sentence: "This means ten and a half billion passenger miles. Yet the Commission finds that the entire travel of all the people of the United States in the year 1921 was only 37,000,000,000 passenger miles." This computation is again based upon the fallacy that the operating ratio would continue to apply on the increased traffic the same as on the traffic

already existing. It is demonstrable by any table showing the situation for a normal period of years that the increased traffic is accompanied by a decline in the operating ratio, and that decline in the operating ratio not only applies to the increase in the traffic, but also is correspondingly reflected back in the entire volume of traffic handled. Considering this last computation, instead of 10,500,000,000 passenger miles being necessary to produce a revenue of \$60,000,000, a simple mathematical computation will demonstrate that 2,090,000,000 passenger miles at 2.88 cents per passenger mile will produce the \$60,000,000. And, as previously outlined, an increase of only 7 per cent in the passenger traffic of the country could readily be absorbed in the existing cars and trains, because of the character of the traffic with which we are dealing.

In their argument carriers say: "There can therefore be no reduction in cost per passenger because of handling a greater volume of traffic. More traffic means more equipment, more power, more cars, more cost." (P. 27.) It would be difficult to construct a more unreasonable comment on transportation matters than the one we have just quoted. A glance at the table contained in the Commission's decision will show that there were over nine billion more passenger miles handled in 1919 and 1920 than in 1921, and yet it is a well known fact that the railroads have increased their equipment during that same period of time. There were more passenger miles handled way back in 1917 and 1918 by several billion than were handled last year. It is an elementary principle that an increase in the volume or density of the traffic, up to the time you reach the saturation point, results in reduced costs per unit. The present situation on American rail-

roads is very far from the saturation point. The estimate of passenger miles for 1922 shows approximately 33,000,000,000 based upon the experience of the first six months. We could increase that by 13,000,000,000 or approximately 40 per cent without any increase in equipment being necessary, because that amount was handled in 1919 and 1920; this is on the condition that the said increase in the passenger traffic would be well distributed throughout the country and not in the shape of excursions and conventions.

COMMISSIONER DANIELS ON THE \$60,000,000 FACTOR.

Commissioner Daniels says: "There would have to be an increase in passenger revenue of \$300,000,000 in order to offset the alleged loss of \$60,000,000." This computation is based upon the erroneous assumption that the operating ratio on the increased traffic would be 80 per cent. As we have elsewhere stated at length, this increased travel brought about by the order at issue would involve filling up the ordinary coaches of the carriers, and would not require additional expenses of any substantial character whatever. As evidencing this fact, we call attention to the table contained in the opinion, showing that the average number of passengers per car during the last six months of 1922 (the latest period available at the time the order was issued) was 15 passengers per car, which was the smallest average in the entire nine years stated in the table. This travel is not like that of commutation traffic where the cars are already full, and where additional passengers would necessitate additional trains or additional cars. It is not like the excursions where additional trains and cars are

necessary. It is incorrect to say that the operating ratio on this additional travel would be a cipher, even though it is true that the added expense would be nominal. The operating ratio would be very substantial on any system of accounting, even though there was no expense added to their present expenses. What would happen would be that there would be a shrinkage in the operating ratio of the balance of the traffic, and in that way this operating ratio would be spread out over the whole. In the production of this traffic there need be practically no actual increase in expense whatsoever, aside from the accounting and policing of the use of scrip tickets, which has been estimated by the carriers for the nation at \$1,680,000, and that would not offset the interest on the \$300,000,000 previously discussed.

The fallacy in the Commissioner's reasoning is further illustrated by the following. Let us compare the years 1919 and 1922. Multiply by two the figures for the first six months of 1922 in order to secure an estimate for the year—this is the method used by the carriers in this proceeding (in their brief before the lower court, page 85, showing estimated revenue for the year, compared to the figure for the first six months as stated by Commissioner Daniels at page 219). We then have the following factors:

	Passengers per train mile	Passengers per car	Revenue Passenger miles
1919	82	21	46,358,000,000
1922	60	15	32,974,000,000

(See Commission's Opinion, page 203.)

Dividing the factors one into the other, we have:

	Passenger train miles	Passenger car miles	Revenue pas- senger miles
1919	565,341,463	2,207,523,809	46,358,000,000
1922	549,566,666	2,198,266,666	32,974,000,000
1919 exceeds			
1922	15,774,797	9,257,143	13,384,000,000
	or less than 3%	or less than one-half of 1%	or 40.6 %

With practically the same number of car miles the carriers handled over 40 per cent more passenger miles; and this enormous increase of 40 per cent in revenue passenger miles was handled with an increase of less than 3 per cent in the train miles. If the Commissioner's theory were correct that an increase in traffic would be accompanied by an added expense of 80 per cent of the revenue—if that theory be sound, then either the railroads were much more efficient under Government Operation, which the carriers very vehemently deny; or an increase of 40 per cent in traffic should have necessitated an increase in passenger train miles of 200,000,000 instead of 15,700,000; and there should have been a greater number of car miles by 800,000,000 instead of 9,000,000.

If 40 per cent more passenger miles could be handled with an increase of only 3 per cent in train miles and one-half of 1 per cent in car miles, we contend that with the superior efficiency of private operation an increase of 7 per cent in passenger miles could be handled with only a fractional portion of 1 per cent increase in train miles and car miles, especially when that increase would be of the character which the order in this proceeding would stimulate, and especially when it would be realized by an average increase of only one passenger per car, in cars that today are almost one-half empty.

For these reasons we believe the reasoning of Commissioner Daniels as to the effect of the order, is unsound.

Commissioner Daniels mentions two roads having 50 per cent and 70 per cent, respectively, of their gross revenue in passenger travel, and he calls special attention to the peculiar circumstances affecting this revenue that would occasion a serious hardship if there should not be the room for increased passenger travel in that section to make the proper offset. Our reply to this argument is simply that those two roads should file an application and demand a hearing as to their peculiar conditions, as contemplated in the Act, and it might very properly necessitate a modified order just as the Commission has made different orders as to freight reductions and freight advances in cases applicable to the different regions of the country. Even this step might prove to be wholly unnecessary. Railroads in New England are in keen competition with the interurban traffic; and as the result of the test of the law, the scrip book might bring back to the railroads a substantial amount of the passenger travel that they are losing to the interurbans. This question can be ascertained only by the experiment or test of the law for a reasonable period.

THE ADDITIONAL COST OF \$1,680,000.

Counsel for carriers claim an operating expense of \$1,680,000 applicable to the handling of scrip books because of the selling, accounting and safe-guarding thereof; saying that this is additional to the cost of other passenger traffic.

In this statement they fail to make any allowance for

the use of some \$300,000,000 in money which they will have use of from a month to twelve months longer than they will of the revenue from other forms of traffic. They also fail to make any allowance for a decrease in the cost of service per unit due to the increased volume of traffic.

The Commission mentions this item as an offset to the interest on the \$300,000,000 which the passengers purchasing scrip books will have to advance, and concludes that the evidence tends to show that the benefit derived from the advance use of the \$300,000,000 will not equal this cost of \$1,680,000. In this we believe the Commission has made an error for the following reasons. These coupons are good for one year. It is admitted that the average life of the scrip books will approximate 60 days. In other words, the carrier will have the use of \$300,000,000, on an average, two months longer than money ordinarily received from other passenger traffic. This will mean, at 6 per cent, approximately \$3,000,000 saved in interest annually. However, the carriers claimed that they are permitted today to hold funds on interline traffic, because their accounts with other carriers are balanced monthly. Consequently, they claim under the scrip coupon system they would have the funds on an average only one month longer than at the present time. At 6 per cent this would approximate \$1,500,000 annually.

This argument is of no consequence whatsoever, for the following reasons:

What one company gains by the monthly balancing of interline accounts it loses with another company. One hand washes the other. What we are here speaking of are the railroads as a whole and their use of the passengers' money for periods ranging from a month to a year.

The carriers collectively do not have possession of these funds from ordinary traffic a day before the travel occurs; while in the case of the interchangeable scrip book, they will have possession of the funds ranging from thirty days to a year in advance of the time the travel occurs. The \$3,000,000 interest is a net saving, without any offset because of current interline accounting methods; and this more than equals the \$1,680,000 representing additional clerical hire, etc.

The carriers in this proceeding made no effort to find what was the value of the property devoted to the passenger traffic. They have made not the slightest attempt to show the ratio of earnings to property. They have made no attempt to segregate the expense of the traffic under consideration from other passenger traffic. The case must fall of its own weight because of their utter failure to even attempt to offer the evidence that might be used to sustain their position. The burden before this Court is on the carriers, not on the Commission. You cannot guess important factors of this character when it is proposed to defeat an Act of Congress, or of the Interstate Commerce Commission on the ground that the fares ordered are confiscatory.

VI. THE EXEMPTIONS FROM THE ORDER MADE BY
THE COMMISSION ARE REASONABLE AND JUST.

Carriers claim that the exemptions from the order directed by the Commission are arbitrary and unreasonable, that they create discriminations between the carriers, and that they constitute an unlawful attempt to exercise legislative powers delegated by Congress.

Counsel for the carriers, in their petition, speak of several hundred railroads being exempted; and in their brief they say:

“There was clearly no contemplation of a blanket exemption leaving out of the scope of the order more than twice as many railroads as were included within it. The power to exempt does not include the power to discriminate against a minority by the device of a general law with exceptions covering the majority. The order, therefore, goes beyond the power of the Commission under the Act.” (Brief before lower court, pp. 87, 88.)

The impression there given is that over twice as much of the transportation system of the United States is exempt from the order as that which is subject to the order. Let us consider precisely what was done as to these exemptions.

The Act provides that:

"the Commission may in its discretion exempt from the provisions of this amendatory act either in whole or in part any carrier where the particular circumstances shown to the Commission shall justify such exemption to be made." (*Ante*, p. 7.)

The Commission exempted practically all carriers except those belonging to Class I, which includes all railroads reporting to the Commission having operating revenues in excess of \$1,000,000 annually.

The Commission in the original decision listed Class I railroads to which the order applied. In its final order contained in the Supplemental Report, 10 of these were excluded (most of these were outside of the Eastern Group, and those in said group have very small operations), leaving 176 carriers subjected to the order.

This qualification was added:

"If any of the carriers exempted should hereafter desire to establish, issue and maintain nontransferable interchangeable scrip coupon tickets under the conditions hereinbefore prescribed, our finding of exemption will not preclude them from doing so." (Commission's decision, 211.)

Counsel for the carriers are quite modest in their statement that the Commission exempted "more than twice as many railroads as were included within it." (Carriers' Brief, 87.) They should have said that the Commission left out more than five times as many railroads as were included in the order; 176 railroads were subjected to the order, and 997 excluded.

The operating companies filing reports with the Commission for the year ended December 31, 1920, were as follows:

Class I	186
Class II	303
Class III	383
Switching and Terminal Cos.....	301
	<hr/>
	1,173

(Parmelee affidavit before the lower court, dated April 7, 1923.)

And yet the whole paragraph of the carriers' brief dealing with this is a sweeping overstatement and exaggeration.

The impression as to the large volume of the American railroad system exempted from the order, which the carriers' brief seeks to give, is entirely erroneous. In the affidavit of Julius H. Parmelee, dated March 20, 1923, before the lower court (sheet 2) it is stated that 98.39 per cent of the net railway operating income of all the carriers of the Eastern group is represented by Class 1 roads. In other words, the railroads exempted by the Commission have approximately 1.61 per cent of the net income of all the carriers involved. And many of those handle no passenger traffic. The probabilities are that the exempted carriers in the Eastern Group handle less than one-half of one per cent of the interstate passenger traffic. In dealing with the situation in the country as a whole, or in the Eastern group as a whole, such an order by the Commission would seem to be well founded and just.

At various places the carriers make criticism of these exemptions directed by the Commission. The reasons cited by the Commission for the exemptions made are a sufficient answer to these contentions. The principal reasons, says the Commission, "assigned for exemp-

tion by the short lines, the electric, and the switching and terminal carriers, are that they are engaged chiefly in intrastate commerce, that their passenger traffic is negligible, that they do not honor or sell passenger tickets to and from points on other lines, that they have no passenger train service, and that there will be little or no demand of them for interchangeable scrip or mileage tickets. We are of the opinion that the particular circumstances shown to us warrant the exemption of all carriers by rail which are not included in Appendix C." (Commission's decision, 211.)

Counsel say Congress has attempted to delegate legislative functions, because no sufficient standard has been set up for the exemptions.

When the Commission was authorized under Section 1 of the Act to establish just and reasonable maximum rates, the standard set up by the statute was very meagre—this was necessarily so. The exigencies of the case made this inevitable. Likewise under this amendment to Section 22, the Congress could not specify the details warranting exceptions; that was wisely and lawfully left to the Commission. The method adopted is the practical and only one workable under the circumstances.

Another objection to the exercise of this authority goes to the claim that the carrier itself is permitted to decide whether it shall be subject to the act or not, counsel saying:

"The Commission delegated to each and several hundred carriers to determine the question whether they should or should not become subject to the law." (Petition, p. 23.)

That is not a correct or fair statement of the order of the Commission. The Commission provided that the

listing of the carriers as exempt would not preclude such carriers from issuing the tickets under the conditions prescribed. In other words, the Commission rules that they are not compelled to charge the higher rate. Certainly that does not preclude them from so reducing their rates if they wish. Precisely the same thing is true of every maximum rate established by the Commission. The carriers may charge a lower rate if they so desire.

By this order the Commission has exempted the carriers from the rule prescribed. No action of the carrier can change that exemption from the order. No discretion in that respect is granted. But each and every carrier is permitted to charge any rate which is below the maximum if it so desires. In this case we have no attempt on the part of the Commission to prescribe a minimum rate.

Counsel say that the order discriminates between carriers because of two carriers handling freight, one can charge only 80 per cent of what the other is permitted to charge for similar service. It is common knowledge that the railroads are distributed into different classes in practically every state in the Union, and a certain percentage of increase is allowed for the smaller weaker roads. The justification for the difference is the difference in conditions.

Carriers except to a classification of the railroads on the earnings basis and place reliance upon the decision of the Court in *Cotting v. Kansas City Stock Yards*, 183 U. S. 79, as supporting the doctrine that a classification of stock yards on the basis of business done was erroneous and void:

"In *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, the state argued (p. 103) that it was proper to classify stockyards on the basis of business done

because rates may be made lower in a plant where the volume of business is large, while in a smaller plant higher rates may be necessary in order to afford adequate returns; but the court held unanimously that this classification was void." (Carriers' Brief, 33.)

Many doctrines and principles were discussed by Mr. Justice Brewer in this decision. But the limitations upon this decision so far as it can be taken as a precedent, have been expressed in a subsequent decision of the Court as follows:

"While the opinion of Mr. Justice Brewer covers a wide range of discussion, a majority of the court (p. 114) placed the decision upon the ground that the statute of Kansas applied only to a single company, and not to others engaged in like business in the state, and thereby denied to that company the equal protection of the laws." *Arkadelphia Milling Co. v. St. Louis S. W. R. Co.*, 150 U. S. 134, 150, 63 L. Ed. 517, 526.

Exemption of the short line and electric railroads in the Adamson Eight Hour law was held not to constitute a violation of the principle of the equal protection of the laws. This objection of the railroads was summarily dismissed in a sentence to the effect that it had been "disposed of by many previous decisions." *Wilson v. New*, 243 U. S. 332, 354, citing *Dow v. Beidelman*, 125 U. S. 680; *Chicago R. I. & P. v. Ark.*, 219 U. S. 453; *Omaha, etc., R. v. I. C. C.*, 230 U. S. 324; *Ches. & Ohio v. Conley*, 230 U. S. 513; *St. Louis, I. M. & So. v. Ark.*, 240 U. S. 518.

In the Minnesota Rate Case, 230 U. S. 352, the Supreme Court sustained the schedule of rates established by the Minnesota Railroad & Warehouse Commission to two of the carriers and did not sustain said schedule as

applicable to a third carrier, the distinction being based on revenues.

In *Chicago, Burlington & Quincy v. Cutts*, 94 U. S. 155, the carrier attacked the constitutionality of a statute in Iowa regulating the railroads. One feature of the law was the classification of the railroads in accordance with their earnings, and this was sustained. Covering the objection the Court, through Chief Justice Waite, said in part:

"The statute divides the railroads of the State into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires. The Supreme Court of the State, in the case of *McAunich v. R. R. Co.*, 20 Iowa 343, in speaking of legislation as to classes, said: 'These laws are general and uniform, not because they operate upon every person in the State, for they do not, but because every person who is brought within the relation and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation.' This Act does not grant to any railroad company privileges or immunities which, upon the same terms, do not equally belong to every other railroad company. Whenever a company comes into any class, it has all the 'privileges and immunities' that have been granted by the statute to any other company in that class.

"It is very clear that a uniform rate of charges for all railroad companies in the State might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the General Assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our prov-

ince is only to determine whether it could be done at all, and under any circumstances. If it could, the legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done." (*Id.*, 163, 164.)

VII. A TEST OF THE RATES IS JUSTIFIED.

No person can foretell with certainty the effect that any rate reduction or rate advance will have. The restoration of interchangeable mileage tickets at a reduced fare from the present basis will have a wholesome effect and will stimulate traffic; but as to how much that will be cannot be determined without an actual test. There is nothing illegal or unusual about a specified period in which to try out a schedule of rates, especially where the evidence before the court as to the alleged confiscatory character of the rates is so profoundly lacking as in the present proceeding, and also where the rates ordered are higher than the average derived from the balance of the traffic.

Counsel urge that the experiment will gather information of little avail in the determination of these issues. Even though we find out how many more people use the scrip coupon books, they ask how would that indicate what they would have traveled had not such tickets been purchased? Most of our statistical researches deal with probabilities and not with certainties so far as the future is concerned. Of course, it cannot be told with certainty how much these parties would have traveled without the existence of the order. Nevertheless, if it be ascertained

that 25 per cent of the passenger travel uses the scrip coupon tickets as estimated by the carrier in this proceeding and this is accompanied by no corresponding decline in the actual number of passenger miles of the balance of the travel, it will be indicative of the fact that additional travel has been created and not that a given amount of travel has been transformed from that using the ordinary ticket to that using the scrip book.

This same issue was presented in the *Towers* case (*Pennsylvania R. Co. v. Towers*, Maryland, April 16, 1915, 94 Atl. Rep. 331). In discussing the proposition the court said:

"It may turn out as the result of the revision of these tariffs that there will be more monthly tickets sold and fewer of the 100-trip tickets, but all of this is to a very considerable degree a matter of conjecture merely. The true test of the effect upon the revenue of the changes made must, and can only, be the test of time and practical experience." *Pennsylvania R. Co. v. Towers*, *supra*, 337.

In support of the conclusion adopting a practical test of the rates several decisions were cited in the *Towers* case which are very much in point in our discussion. Mr. Justice Woods, in *Tilley v. Railroad Company*, 5 Fed. 641, after discussing the somewhat uncertain testimony as to the remunerative character of the tariff at issue, said:

"Which view is the correct one it is impossible to decide upon the evidence submitted. There is, however, a conclusive way, and it seems to me that it is the only one, by which this controversy can be settled, and that is by experiment. A reduction in railroad charges is not always followed by a reduction of either gross or net income. It can soon be settled which is right—the railroad company's officers or the Railroad Commission—in their view of the effect of the commission's tariff of rates, by allowing

the tariff to go into operation. If it turns out that the views of the railroad company are correct, and that the schedule fixed by the commission is too low to afford a fair return upon the value of the road, the remedy is plain, for the law makes it the duty of the commissioners 'from time to time, and as often as circumstances may require, to change and revise said schedules.' " (*Id.*, 663.)

In the celebrated *Knoxville Water case*, 212 U. S. 1, the Court said:

"The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. * * *

If hereafter it shall appear under the actual operation of the ordinance, that the returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent another application to the courts of the United States or to the courts of the State of Tennessee. But, as the case now stands, there is no such certainty that the rates prescribed will necessarily have the effect of denying to the company such a return as would avoid confiscation." (*Id.* 18, 19.)

In *Willcox v. Consolidated Gas Company*, 212 U. S. 19; 53 L. Ed. 382, a similar issue was presented. The Court said:

"Of course, there is always a point below which a rate could not be reduced, and, at the same time, permit the proper return on the value of the property; but it is equally true that a reduction in rates will not always reduce the net earnings, but, on the contrary, may increase them. The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test. In such a case as this, where the other data upon which the computation of the rate of return must be based, are, from the evidence, so uncertain, and where the mar-

gin between possible confiscation and valid regulation is so narrow, we cannot say there is no fair or just doubt about the truth of the allegation that the rates are insufficient." (*Id.* 51, 52.)

In the syllabus of the decision appears the following:

"A court of equity ought not to interfere by injunction with state legislation fixing gas rates before a fair trial has been made of continuing the business under such rates."

This expresses in substance the conclusions of the court. After citing these various decisions the lower court in the *Towers case* concludes:

"In the case in which this opinion (referring to the Willcox decision) was rendered, just as in the case now under consideration, the court was asked to intervene before there had been any actual experience of the practical result of the rates established. So in the present case the test of experience will soon make it clear whether the rate imposed by the order of the Public Service Commission can, in any proper sense, be termed 'confiscatory' or compensatory; if the latter, no injunction ought to issue, while if not compensatory, beyond any doubt, an injunction should be granted." *Penn. R. Co. v. Towers, supra*, 338.

In the *New England Divisions case* decided recently (February 19, 1923), "the evidence left in the minds of the Commission many doubts," and the order was issued subject to future modification. The provisional character of the order was attacked. Mr. Justice Brandeis, speaking for the court, stated in the opinion:

"A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. * * * That the order is not obnoxious to the due process

clause, because provisional, is clear. If this were not so, most temporary injunctions would violate the Constitution." *New England Divisions Case, Akron, Canton & Youngstown Ry. Co. v. United States*. . . U. S. . . . ; 67 L. Ed. 308, 315.

In the present case, it must be remembered that the Commission found a probability of increased traffic; and furthermore that the rates prescribed were found to be just and reasonable for this class of traffic. Commission decision, 210.

VIII. THE ORDER OF THE COMMISSION SHOULD NOT
BE INTERPRETED AS APPLYING TO INTRASTATE
PASSENGER TRAVEL.

The order of the commission is attacked because of an alleged attempt to regulate intrastate commerce. Neither the statute, nor the order can fairly be interpreted as applying to intrastate traffic. The Act under which the order was made is a part of the Interstate Commerce Act, which in turn excludes intrastate traffic, except under conditions which have been the subject of much litigation of late, and which are not involved in this proceeding. The decision of the commission in the case at issue makes no reference to intrastate travel, except in connection with the short lines; then it is stated that the bulk of their travel is intrastate in character, and they are excluded from the order. The Commission does not specifically exclude or include intrastate travel in its order; but proper construction would interpret the order in harmony with the powers of the Commission just as statutes of a similar character are construed. *Texas v. Eastern Texas R. Co.*, 258 U. S. 204, 217; *United States v. Del. etc.*, 213 U. S. 366.

A similar issue has arisen frequently in New York State as to the constitutionality of state laws. *Dillon v.*

Erie is a leading case in which this subject was considered. The court said in part:

"We shall therefore confine ourselves at present to the discussion of the defendant's contention that the Act is unconstitutional because it comprehends railroads employed in interstate as well as intrastate commerce. Nothing in the act itself makes its provisions, in terms, applicable to interstate carriage of persons or property. It should not be assumed, therefore, if unconstitutionality would result, that such was the intention of the legislature. A conflict between the constitution and a statute will never be implied. *Cochran v. Van Surlay*, 20 Wend. 365; *Newell v. People*, 7 N. Y. 9, 109; *People v. Fisher*, 24 Wend. 215. So also, a statute cannot be said to be unconstitutional if it is not in direct and necessary conflict with the constitution (*Morris v. People*, 3 Denio, 381) nor unless it cannot be supported by any reasonable intendment or allowable presumption (*People v. Supervisors of Orange Co.*, 17 N. Y. 235). 'A statute can be declared unconstitutional only when it can be shown beyond reasonable doubt that it conflicts with the fundamental law,' and 'until every reasonable mode of reconciliation of the statute with the constitution has been resorted to, and reconciliation has been found impossible, the statute will be upheld.' *People v. Board of Sup'rs of Westchester Co.*, 147 N. Y. 1, 16, 41 N. E. 563, 566." (*Dillon v. Erie R. Co.*, 43 N. Y., Supp. 320, 325. See also *Purdy v. Erie R. Co.*, 162 N. Y. 43, 56 N. E. 508, 511.)

IX. THE REQUIREMENT OF INTERLINE CREDITS
DOES NOT CONSTITUTE A TAKING OF PROPERTY
WITHOUT DUE PROCESS OF LAW.

Paragraph XIX of Carriers' petition claims the commission's order is void because it requires one carrier without its consent, to furnish transportation upon the credit of another carrier, which may entail losses, thereby taking property without due process of law.

Such losses must necessarily be a part of the costs of the public service which the carriers are rendering. They are an essential element of any national transportation system operated by different private corporations. They are an incident to the service that has been recognized from time immemorial as a part of the burden they must carry. The railway companies are constantly assuming such credit in all interline shipments where accounts are settled monthly; they are assuming such credit whenever a car leaves a home line for another railroad. In the lower court's and in the commission's decisions these same principles have been approved.

A claim similar to the one presented by the carriers on this subject has been repeatedly advanced in cases dealing with the railroads collectively. The issue was handled in a masterly manner in *Atlantic Coast Line v.*

Riverside Mills, 219 U. S. 186, involving the liability of the initial carrier under the Carmack Amendment.

The interline credits are a part of the responsibility that carriers must assume when they undertake to engage in interstate commerce.

“The rule is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility.” (*Id.* 203.)

One of the early mileage book cases was decided by the Supreme Court of Massachusetts, entitled, *Attorney-General v. Old Colony Railroad*, 160 Mass. 62; 22 L. R. A. 122. This decision was rendered in 1893. The majority held that the law was a valid exercise of legislative authority, except in that it required one railroad to accept the credit of another railroad on the interchangeable mileage ticket. The court declined to hold the law unconstitutional on the ground that it contained a delegation of legislative power to the Board of Railroad Commissioners so far as determining companies that would be exempt from the provisions of the Act was concerned.

In regard to the subject of interline credit the majority opinion stated:

“The most formidable objections are that the statute authorizes one railroad to determine the conditions on which another railroad must carry passengers, and compels one railroad to carry passengers on the credit of another.” (*Id.* 119.)

In the majority opinion the court said, “We have been referred to no judicial decision where any such legislation has been considered.” Mr. Justice Knowlton filed a dissenting opinion, which was concurred in by Mr. Justice Holmes, now of the Supreme Court. The Justice held that this ruling as to accepting the credit of other railroads, was a proper exercise of legislative power in

the premises, and he explains the doctrine ably in the following language:

"It is a matter of common knowledge that every railroad does business on the credit of other railroads to a much larger amount than would ever be done under a statute of this kind. But, suppose there is a possibility of trifling loss in a case which might arise under the statute, that does not render the statute unconstitutional. The question is rather whether there is a probability of losses so large as to make such a requirement plainly unjust and unreasonable as an interference with the 'right of acquiring, possessing and protecting property.' I think nobody can contend that there is such a probability. Moreover, the very idea of the exercise of the police power necessarily implies a greater or less interference with the acquisition, use and enjoyment of property. *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27; *Miller v. Horton*, 152 Mass. 540, 10 L. R. A. 116." (*Id.* 123.)

Relative to the scope of this police power, the Justice said:

"The property of railroad corporations is devoted to the public use. The truth of this proposition is nowhere questioned. Such corporations may exercise the right of eminent domain by taking lands for their roads against the will of the owners. The business of providing highways and arranging conveniences to enable people easily to pass from place to place is a part of the public business which may be done by the State. If the State grants franchises and delegates the transaction of this business to corporations, it retains the right to regulate the business for the public good in any reasonable way." (*Id.* 122.)

The dissenting opinion in that Massachusetts case of thirty years ago expresses the law of today.

The lower court has correctly summarized the law in this respect as reflected in *Atlantic Coast Line R. Co. v*

Riverside Mills, supra, 219 U. S. 186; *Michigan R. Co. v. Michigan Railroad Com.*, 236 U. S. 615 (concerning the control over the interchange of cars), and *St Louis S. W. Ry. Co. v. U. S.*, 245 U. S. 136 (relating to the power to require joint rates); *N. Y. C. v. U. S. supra*, 951, 954.

SUMMARY.

After the war there has been a struggle in all lines of business to get matters back to the pre-war basis, to reinstate the customs and standards that had been gradually evolved by generations of experience. This has applied to the railroad industry. The railroads have voluntarily reinstated many of the rules and regulations and practices which were suddenly wiped away at their instance, when the Director General took charge of the railroads in 1918. But one of the hardest tasks the people have had to perform is to have restored some form of interchangeable tickets on conditions similar to those existing prior to the war.

The carriers today have in effect interchangeable scrip coupon tickets of denominations of \$15, \$30 and \$90, sold at the standard one-trip fares, and interchangeable among practically all railroads, except electric and short line carriers. (Com. Dec., p. 205.) The Commission's order in this case undertakes to prescribe rates, rules and regulations applicable to what the carriers themselves maintain at the present time. The Commission's order exempts the electric and short lines, as do the carriers at the present time.

The rules and regulations proposed by the Commission have been agreed to with but few exceptions, by the car-

riers; and the issues are confined almost entirely to the fare prescribed.

In the effort on the part of the railroads to defeat the Act of Congress and the decision of the Interstate Commerce Commission's at issue in this proceeding, the carriers rely chiefly on the following propositions: that the order will create discriminations among passengers; that the order will reduce passenger revenues to a confiscatory basis; and that the Commission misconstrued the law.

In developing these various issues counsel for the railroads have fallen into numerous errors, both of law and of fact.

The carriers have failed to present to this court any evidence of the value of the property devoted to the service under consideration.

The carriers have failed to present any evidence of the expenses chargeable to this traffic, which is at issue.

In order to come within their interpretation of the Lake Shore decision, the carriers have claimed that the Interstate Commerce Commission has established a standard just and reasonable fare of 3.6 cents per passenger mile for the United States as a whole, and that any rate established by the Commission below that fare will create unlawful discriminations.

At the present time there is no fixed charge for passenger traffic throughout the United States, which has been established by Congress, the Commission or any other governmental body. (*Ante*, pp. 32-34, 45-48.) Counsel for the railroads have made a basic error in this respect. In addition to that, the railroads cannot be heard to set up this complaint of discrimination between passengers. (*Ante*, 41, *et seq.*)

The record shows that the prevailing fare for one trip tickets is 3.6 cents per passenger mile, the average fare for all passenger travel is 3.03 cents, the average fare on 75 per cent of the travel in the United States (the portion unaffected by the Commission's order) is 2.84 cents, and the average cost for all passenger traffic is 2.58 cents per mile. (*Ante*, 33-39, 105.)

If the conditions have warranted such a large volume of fares to be established for excursions, conventions, commutation service, tourist service, etc., that the average fare paid on 75 per cent of the passenger travel of the nation has been brought down to 2.84 cents per mile, and if the average cost on all passenger travel is 2.58 cents per mile, we fail to see the force to the argument that the Commission has created a special favored class at unremunerative, confiscatory rates, when it requires the carriers to haul the balance of the population at 2.88 cents per mile whenever an individual purchases a 2,500 mile ticket to be used within one year, which is an amount seven or eight times greater than the travel of the average individual in the United States.

The carriers have made a number of mistakes of fact other than those suggested above, including the following:

First, they have exaggerated the amount of the railroad industry which has been exempted by the Commission from its order. (*Ante*, 129-131.)

Second, they have erroneously applied the operating ratio of the passenger business, assuming that it was not only true in regard to the passenger traffic as a whole, but also as to each department of the passenger service, and as to every dollar of passenger revenue. (*Ante*, 104.)

Third, the carriers claim that the order will cause a loss of \$60,000,000 in passenger revenue. This is a computation based on two alternative assumptions: (a) that 30 per cent of the passenger revenue (or 25 per cent of the passenger miles) will be affected by the 20 per cent reduction, and there will be no increase whatever in the volume of travel in the United States by virtue of the order; or (b) that the increased travel will be handled at an average cost per mile approximating that of the present travel. Both assumptions are untenable, and contrary to the weight of evidence before the Commission and before the court. (*Ante*, 117 et seq.)

Fourth. Counsel for the railroads say that it will take an increase of more than 25 per cent in passenger travel before there will be any reduction whatever in the alleged loss of \$60,000,000 decrease in passenger revenues; whereas, any increase at all in travel will in fact tend to offset that loss, whether the increase is $\frac{1}{2}$ of 1 per cent or 40 per cent. An increase of only 7 per cent of the travel, or an increase of only one passenger per car (and today these cars are almost one-half empty on an average) will more than offset this entire \$60,000,000. (*Ante*, 120.)

Counsel for the carriers place great reliance upon the doctrine of the Lake Shore Case, holding that "The Legislature having fixed a maximum rate at what must be presumed, *prima facie*, to be also a reasonable rate, we think the company then has the right to insist that all persons shall be compelled to pay alike. * * *" Regardless of the basic error of fact on the part of the carriers which makes that doctrine inapplicable to the present proceeding, the doctrine itself is unsound, for the legislature has the power to vary rates in accordance

with varying circumstances and conditions. The use of the Lake Shore decision as a precedent should be limited very definitely to the facts and circumstances there presented; and to the extent that it is in error on those facts, the Lake Shore decision should be overruled. There is abundant precedent for such action in the treatment accorded to *Cotting v. K. C. Stock Yards*, *supra*, in *Arkadelphia Milling Co. v. St. L. S. W. R. Co.*, *supra*, and also the treatment accorded the decision in the Lake Shore case, in the decision of this Court in the Tower case, *supra*.

Counsel for the carriers have relied on doctrines stated in the Lake Shore case which have not been accepted as the law, but have been condemned in other decisions; they have misinterpreted the decisions of the Interstate Commerce Commission in the cases entitled: Increase in Rates, 1920, and Reduced Rates, 1922, *supra*; they have distorted the decision of the Supreme Court of New Hampshire in *State v. Railroad*, *supra*; and they have misapplied the doctrines of *Cotting v. Kansas City Stock Yards*, *supra*.

Concerning the claims that the Commission based its order upon the provisions of the amendment to Section 22 of the Interstate Commerce Act, erroneously believed to be mandatory, and not upon its own independent judgment, nor upon the facts before it, we cite the following:

The Commission prescribed in its original notice as one of the leading subjects to be investigated: "What rate or rates shall be established as just and reasonable for each and every form of ticket?"

The Commission, in its decision, interpreted the law under which it was acting as leaving to the Commission

“to determine after notice and hearing the ‘just and reasonable rates’ at which the form of ticket prescribed shall be issued.”

And further, the Commission specifically held “that the rates resulting from that reduction will be just and reasonable.”

This brief is filed on behalf of the traveling man. It is true that the establishment of the lower passenger fares for interchangeable scrip coupon books will be of value to the commercial traveling men of the United States. However it is not contemplated that they shall constitute a class unto themselves, but rather that the privilege shall be open to all parties.

Mr. D. K. Clink, a representative of the federation filing this document with the Court, testified before the Commission in substance as follows: The comments of the representatives of the railroads concerning traveling men are unjust. They are on the road approximately 10 months of the year. No class or profession of our citizenry devotes more hours to arduous labor. No fixed prescribed hours of labor can apply to the traveling salesmen—they are on the move night and day, deprived of home comforts and hours of recreation. Their business activities and optimism are a stimulant to the country’s development and progress. They are an indispensable and valuable national asset. References to ability to pay the full single trip fare were unhappy. Those privileged to avail themselves of tourist and summer and winter resort fares at a discount ranging from 25 to 50 per cent under the basic one-way fare, spending their time in luxury and comfort, are those who should be classed as best able to pay the basic one-way fare. “A reduction in fares would re-employ thousands now

idle and add additional thousands to the ranks of the traveling fraternity. The commercial travelers and employers ask for no special privileges, nor do they expect something for nothing. They do expect and should receive consideration commensurate with their enormous patronage and their indispensable activities of lasting benefit to the nation and its people."

Cost of service, and public policy, both are matters to be given proper consideration. The traveling man not only furnishes passenger traffic, but he is an important factor in creating freight traffic, and on him depends, to a large extent, the operation of the mills and factories of the United States.

But the traveling men are not asking to be treated as a class. They are before this Court urging the wisdom and justice of a distinction based upon differences in conditions.

There is a marked difference between the distance traveled by the average individual in the United States, and the distance traveled annually by a party in order to comply with the provisions proposed as to these scrip books. The total revenue passenger miles per inhabitant, aside from those who will probably purchase the scrip books, range from 250 to 350 miles annually compared to 2,500 miles as the minimum under the Commission's order. (*Ante*, 91, 92.)

The traffic which this order will stimulate is not spasmodic, but it is of such a character that it will fill up existing equipment.

If all of us traveled as much as the minimum in this order, the passenger revenues of the railroads would increase several hundred per cent.

More travel per train mile means less cost per unit; and that portion of the traffic creating the greater net should be credited with it in any fair system of accounting for the determination of the profit from the traffic. That is precisely what the railroads themselves do in their consideration of the profitableness of tourist, excursion, convention and other forms of travel.

The wisdom of the Act of Congress, and of the order of the Commission thereunder, is not at issue before this Court.

We submit that there is substantial evidence in support of the conclusions announced by the Commission; and that the order at issue is sustained by the weight of authority.

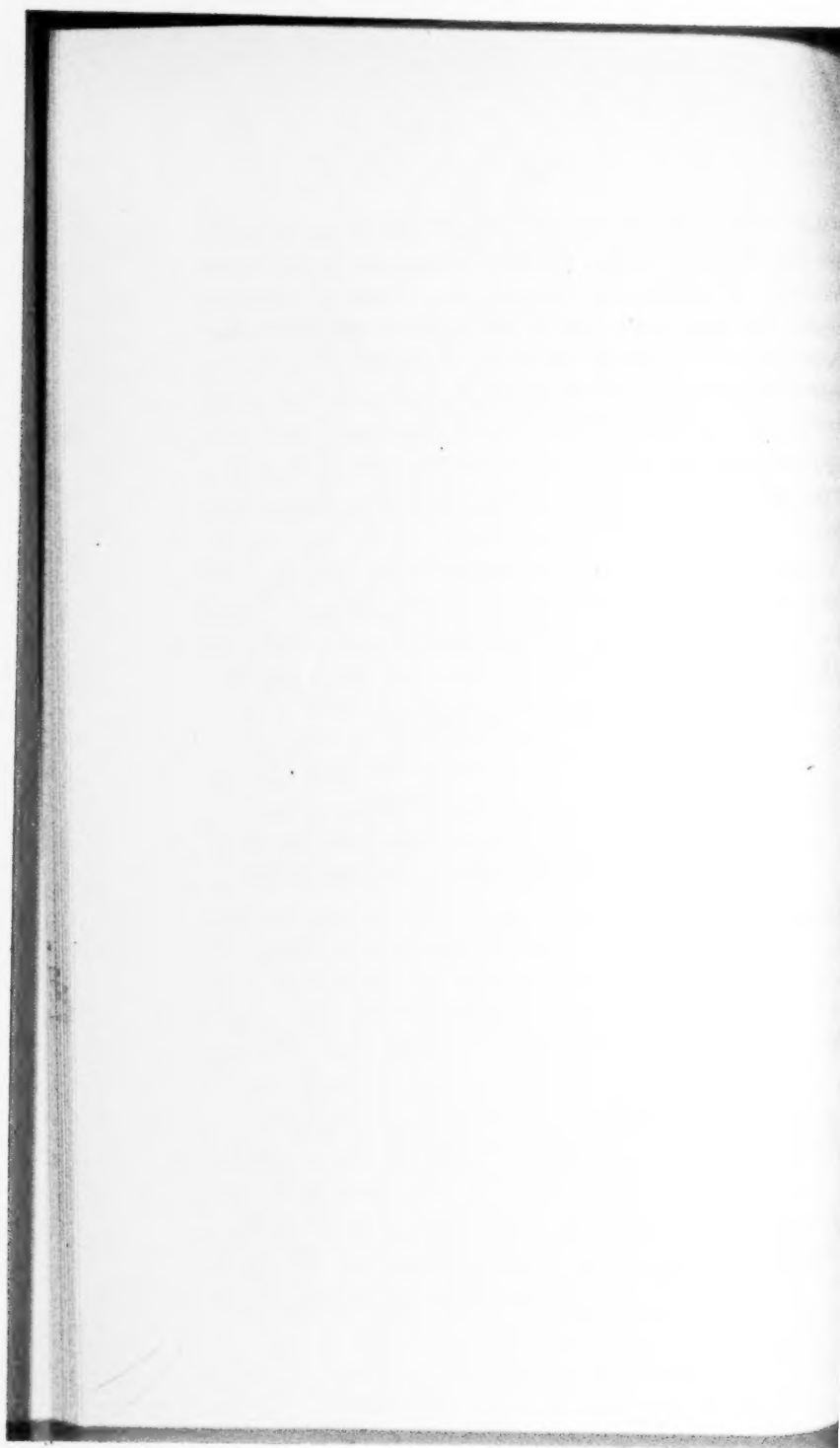
Respectfully submitted,

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Commercial Travellers' Organizations.*

Chicago, Illinois, Sept. 15, 1923.



Supreme Court of the United States

OCTOBER TERM, 1923.

No. 469.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, NATIONAL COUNCIL OF TRAVELING SALESMEN'S ASSOCIATIONS, *et al*, APPELLANTS

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, ATLANTIC CITY RAILROAD COMPANY, ATLANTIC & ST. LAWRENCE RAILROAD COMPANY, *et al*,

Appeal from the District Court of the United States for the District of Massachusetts.

BRIEF BY LEON B. LAMFROM

Amicus Curiae.

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DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MASSACHUSETTS

THE NEW YORK CENTRAL RAILROAD
COMPANY; ATLANTIC CITY RAIL-
ROAD COMPANY, ATLANTIC & ST.
LAWRENCE RAILROAD COMPANY, *et*
al,

Petitioners,

against

THE UNITED STATES OF AMERICA,
Respondent.

In Equity,
No. 1808

BRIEF BY LEON B. LAMFROM

Amicus Curiae.

The undersigned member of the bar of Milwaukee, Wisconsin is general counsel for the National Association of Men's Apparel Clubs, a national organization of traveling salesmen throughout the United States, totaling approximately six thousand members. The national association is composed of constituent apparel clubs having offices in twenty-four different states and representing in turn thirty-three states. All of the traveling men who are members of the national association are also members of the local clubs and are all engaged for a substantial part of the year in traveling upon the railroads of the country in their business of selling men's apparel.

All of the members of the National Association of Men's

Apparel Clubs, together with the general public, will be vitally effected by the decision in this case.

POINT I.

THE INTERSTATE COMMERCE COMMISSION HAVING BEEN CREATED BY CONGRESS IS UNDER THE SAME LEGAL CONTROL BY CONGRESS AS THE INFERIOR FEDERAL COURTS, AND BEING A FACT-FINDING BODY CAN BE DIRECTED BY CONGRESS TO FIND A FACT.

Prior to the passage of the act in question and under construction in this case, it would seem that the Interstate Commerce Commission had no power to order the railroads to issue interchangeable mileage tickets.

Under Section 22 of the Interstate Commerce Commission act as amended by the acts of March 2nd, 1889, February 8th, 1895 and August 8th, 1922 it was provided that nothing in the act shall prevent the issuance of joint interchangeable 5000 mileage tickets with special privileges as to the amount of free baggage that may be carried under the mileage tickets of 1000 or more miles. It was, however, left to the carriers to determine as to whether these mileage books shall be issued and there was nothing in the act to give the Interstate Commerce Commission at least express authority to direct the issuance of such mileage books. Evidently, and it must be presumed that it was in furtherance of some public policy, congress decided that there should be authority in the Interstate Commerce Commission to direct the issuance of interchangeable mileage or scrip coupon tickets. Congress went even farther. It

directed the Commission to require the issuance of the interchangeable mileage scrip coupon tickets *at just and reasonable rates*. (Record 28, 29, 30, 31.) So far then, we have a direction from congress to an agency created by congress to ascertain only one thing that is important and substantial: that is the just and reasonable rate at which the interchangeable mileage or scrip coupon tickets should be issued.

It must be assumed that in finding such rate, the Interstate Commerce Commission found it just and reasonable. In its conclusion, after taking evidence on the question, the Interstate Commerce Commission said:

"We further find that the rates resulting from that reduction will be just and reasonable for this class of travel." (Record 51.)

This is a finding of fact by the Interstate Commerce Commission which must stand alone as being the ultimate conclusion that the rate established was just and reasonable.

Courts do not take the initiative in determining rates, and the rule established is that the courts will not interfere with an act of the Commission unless it clearly appears that such an act or finding is beyond its authority.

Interstate Commerce Commission v. Louisville & Nashville Railroad Company, 190 U. S. 273;
Texas & Pacific Ry. Co. v. Abilene Cotton Oil Company, 204 U. S. 426;
Prentiss et al v. Atlantic Coast Line Company, 211 U. S. 210.

It would clearly appear that all that Congress did was to direct the Interstate Commerce Commission to require the carriers to issue interchangeable mileage or scrip coupon tickets, which was at most a legislative direction to an administrative agency, the legality of which cannot be doubted. Having, after an extensive hearing, decided what the just and reasonable rates should be for such interchangeable mileage or scrip coupon tickets, can such finding, in effect, now be set aside by the court, because the court has come to the conclusion that Congress did not intend that it should be mandatory upon the Interstate Commerce Commission to reduce the rates and that it would seem that the Interstate Commerce Commission concluded possibly that it was mandatory, or what it believed to be the spirit and purpose of the act, if the rate found was just and reasonable?

POINT II.

IF THE RATE FOUND BY THE INTERSTATE COMMERCE COMMISSION IS JUST AND REASONABLE AND WAS MADE AFTER PROCEEDINGS TAKEN AT THE DIRECTION OF CONGRESS, THE INTERPRETATION OF THE INTERSTATE COMMERCE COMMISSION OF THE INTENT AND MEANING OF THE CONGRESSIONAL ENACTMENT IS IMMATERIAL.

In passing upon the question of the just and reasonable rate, the Interstate Commerce Commission said in its decision :

"In addition to the obvious spirit of the law the record warrants the view that a coupon ticket at a reasonably reduced fare should be established at least for an experimental period. In no other way can the apparent purpose of the law be given practical effect."
(Record 51.)

The court below seems to have been in error, in unduly emphasizing this comment of the Interstate Commerce Commission. We take it that the most that can be said with regard to this expression of the Interstate Commerce Commission on the spirit of the law is that it was merely an observation of an agency of a legislative body. There is nothing in the decision that would indicate that the Interstate Commerce Commission would not have found a just and reasonable rate if it had not expressed its view as to the obvious spirit of the law. The fact remains that it did find a just and reasonable rate, and that that rate was found upon evidence presented. All that Congress had required the Interstate Commerce Commission to do was to find such just and lawful rate and then to require the carriers to put it in force. What difference can it possibly make as to what the Interstate Commerce Commission's interpretation was as to the spirit of the law? No serious question can be raised to the right of Congress to require the railroads to issue interchangeable mileage books if such requirement does not conflict in some manner with accepted principles of constitutional law. The lower court held that the amendment itself was not unconstitutional, and in no way attempted to pass upon the question of the just and reasonable rate. Therefore, the basis upon which the lower court issued the permanent injunction against the enforcement of the order of the Commission was plainly

not upon the challenge of the right of congress to so legislate, nor upon the basis that the Interstate Commerce Commission erred in its finding, but only upon the basis that possibly the Interstate Commerce Commission might have thought that the act was mandatory upon it in respect to a reduction in the rate; or that the Interstate Commerce Commission did not exercise its own judgment in reducing the rate and thus abdicated its function.

It would seem to be a well established principle of law that before the court could interfere with the order of the Interstate Commerce Commission in this regard, that such order must plainly appear to be void as violative of the constitution or wanting in conformity to statutory authority or that the power of the Commission has been arbitrarily exercised.

St. Louis South Western Ry. Co. et al vs. United States, et al, 234 Fed. 668.

POINT III.

ASSUMING THAT THE UNDERSTANDING OF THE INTERSTATE COMMERCE COMMISSION WAS THAT THE CONGRESSIONAL LEGISLATION IN EFFECT WAS TO LOWER THE RATE, AND NOTWITHSTANDING SUCH LEGISLATION THE RATE FOUND BY THE INTERSTATE COMMERCE COMMISSION AS REDUCED IS JUST AND REASONABLE, IT IS CONTENDED THAT THIS IS NO CAUSE FOR ENJOINING THE ENFORCEMENT OF THE ORDER OF THE COMMISSION.

Is there anything unlawful in a congressional direction to the Interstate Commerce Commission indicating that it, Congress, thinks that a certain rate applying in interstate commerce is too high, and that the Interstate Commerce Commission should therefore establish a just and reasonable rate? We think that we can unhesitatingly answer this question that such an act would not be unlawful, nor would the performance under it by the Interstate Commerce Commission of its direction be unlawful, if the Interstate Commerce Commission found as a fact the just and reasonable rate.

Vesting of power by legislative bodies in commissions does deprive the legislative bodies of directory control, provided in the exercise of that directory control, rights established by other principles of law, either legislative or constitutional, are not violated. There is nothing in the record to show that the Interstate Commerce Commission found the just and reasonable rate on anything else but the evidence. That we think is fundamental to the whole case and must determine it.

It seems to us that the whole question comes down, not to the interpretation by the Interstate Commerce Commission of the motive back of the legislation, but only the question of whether or not under the directory legislation of Congress, the Interstate Commerce Commission acted arbitrarily or in excess of its power, or has issued a rule or order that is unreasonable or unlawful.

The only question involved here we think, outside of the reasonableness of the rate, is the power of the Interstate Commerce Commission under this legislation to issue the order.

Interstate Commerce Commission v. Illinois Central Railroad Company, 215 U. S. 452.

In this regard the power of the Interstate Commerce Commission under the act to make the finding that it did is evident because by the act it was directed to require the carriers to issue the books or tickets at just and reasonable rates. Having exercised that power and having exercised it reasonably, what other possible valid reason can be left by which to attack the action of the Commission? Courts have determined again and again that they are not concerned with the motive of legislative enactments.

The Interstate Commerce Commission, being in effect an arm or creature of Congress, can the court pass upon the motive under which the Interstate Commerce Commission acted if it acted within its power and in a manner that was reasonable?

Assuming that congress did not necessarily intend by the act in question to have the Interstate Commerce Commission lower the rate, nevertheless, it did direct the Interstate Commerce Commission to find the just and reasonable rate. The latter is the substance of the legislation. All that the Interstate Commerce Commission did was to carry out the substance of the legislation and in doing so it ascertained the just and reasonable rate for this class of service, to be lower than the regular rate.

Is there anything wrong in an administrative body being actuated by what it conceives to be the spirit of the law when its ultimate finding is only a finding of fact? How can it be said that the order of the Interstate Commerce Commission is erroneous because, if we admit, for

the purpose of argument, it misconceived the desire of Congress, if in carrying out the legislative direction it found that the rate should be lower and misconceived this to be the implied direction of congress?

We contend, with all deference, that it cannot, correctly be said, as was said by the lower court in its decision:

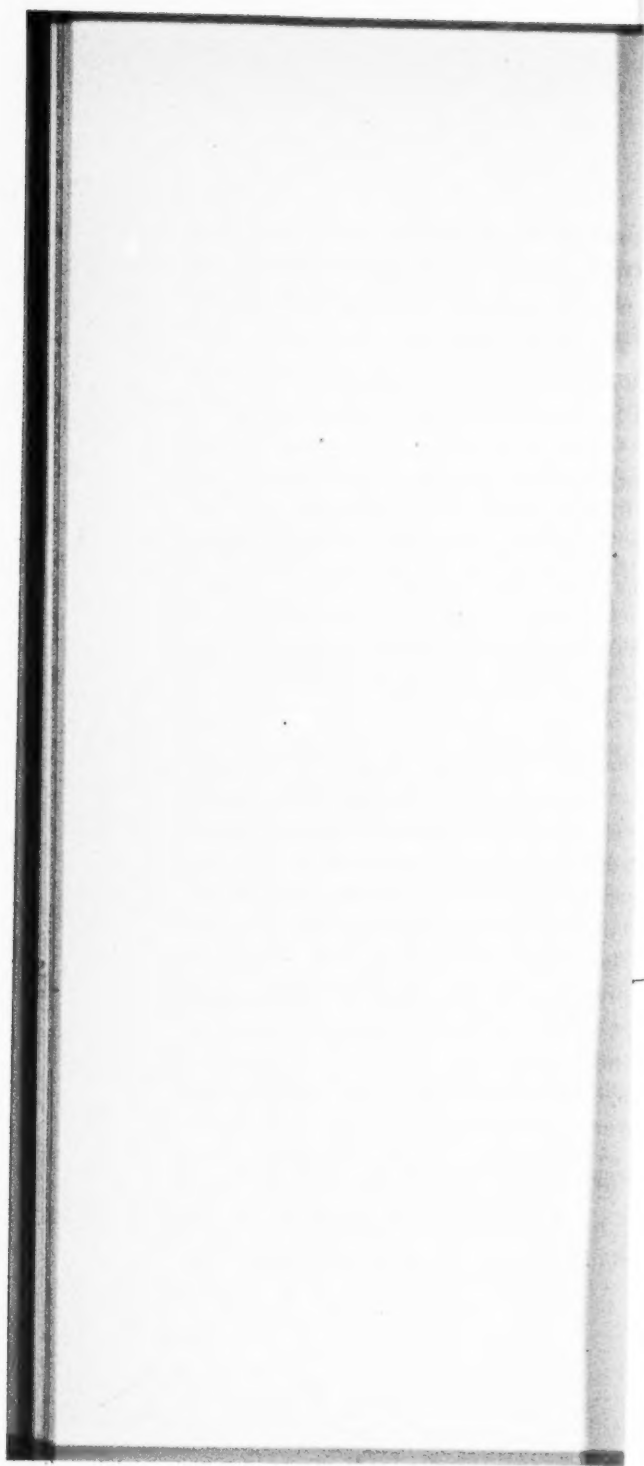
"If, on the other hand, it acted upon the interpretation which we have found to be the correct interpretation of the amendment but based its conclusions, not upon its own independent judgment, but what it believed to be the spirit and purpose of the act, which, if it means something other than a sound interpretation of the act, must mean some supposed desire of the Congress, it acted contrary to law in abdicating the functions vested in it," (Record 164)

because of the fact that the Interstate Commerce Commission did find as a matter of fact that the just and reasonable rate for this class of service was lower than the regular rate. There is nothing in the record to show that the finding of the Interstate Commerce Commission was induced by anything but its deductions from the evidence submitted upon the hearing. The fact that it might be mistaken in its interpretation of the intent of the law, cannot render its decision invalid if its decision as to the ultimate thing to be found is correct.

It is therefore respectfully urged that the order of the District Court be reversed.

Respectfully submitted,

LEON B. LAMFROM,
Amicus Curiae.



UNITED STATES, INTERSTATE COMMERCE
COMMISSION, NATIONAL COUNCIL OF TRAV-
ELING SALESMEN'S ASSOCIATIONS, ET AL. v.
NEW YORK CENTRAL RAILROAD COMPANY
ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MASSACHUSETTS.

No. 469. Argued January 9, 10, 1924.—Decided January 21, 1924.

1. Under the Act of August 18, 1922, amending § 22 of the Interstate Commerce Act, the rates for interchangeable mileage coupon tickets must be just and reasonable. P. 609.
2. Where the Commission's conclusion that a reduced rate fixed by it for such tickets was just and reasonable was contradicted by its findings of fact and was obviously based on a misconception of the amendment as requiring a reduction, *held*, that the conclusion was one of law and not binding on the court. *Id.*

288 Fed. 951, affirmed.

APPEAL from a decree of the District Court which enjoined enforcement of an order of the Interstate Commerce Commission requiring the appellee railroads to issue scrip coupon tickets at reduced rates.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Mr. Attorney General Daugherty* was on the brief, for the United States.

Laying hold of the following language of the Commission, "The spirit and the apparent theory of the law is

that carriers shall be required to sell such a ticket at something less than the standard fare, which would be just and reasonable because it would be sold in such quantities as to stimulate travel and thereby increase net revenue . . . ,” the District Court held “it is clear” the Commission proceeded on the assumption “that the spirit and theory of the congressional amendment required them to order the scrip coupons to be issued at reduced rates” Apparently because of those words in the report, and that only, the order was annulled.

For a case of such great public importance, this would seem a narrow and technical view on which to overthrow the order. The District Court assumed that the Commission ignored its own order of August 23, 1922, fixing a hearing on the question, *inter alia*, “What rate or rates shall be established as just and reasonable for each or either form of ticket?”; that the Commission shut its eyes to the voluminous testimony and exhibits before it; that the language of the Commission, “In addition to the obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established at least for an experimental period,” and “we further find that the rates resulting from the reduction will be just and reasonable for this class of travel,” does not mean what it says.

There is no charge in the petition that the order is without substantial evidence to support it. The adequacy of the hearing before the Commission is not questioned.

The history of the times under which Congress acted must be considered. Reference to committee reports and debates of senators and representatives is permissible. *Stafford v. Wallace*, 258 U. S. 495; *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290; *Standard Oil Co. v. United States*, 221 U. S. 1. See also *Holy Trinity Church v. United States*, 143 U. S. 457; *Chicago Board of Trade v. United States*, 246 U. S. 231. [Counsel then referred at

length to proceedings in the House and Senate; also to the report of the Commission in this case, and to its earlier reports on mileage and commutation tickets.]

Charges similar to those here made have already been exploded in the *New England Divisions Case*, 261 U. S. 184.

The arguments that the reduced rate is unreasonable appear to rest on the insecure foundation that, because the Commission granted increased rates in former years, which it found just and reasonable, any reduced rates, in whatever form, must necessarily be unreasonable, confiscatory, and void.

It is a new theory that the power of Congress and the Commission is limited to rate regulation in the sense that the rate must be made final in the outset. From the beginning a rate fixed by the Commission or otherwise has been expressly made subject to recovery after payment by the shipper when shown to be excessive. Reparation in large sums has frequently been awarded by the Commission and recovered through the courts.

The amendment should be construed in the light of Title IV of the Transportation Act.

The reasonableness of a rate when based on substantial evidence is a question of fact. Nor will the Court consider the weight of the evidence or the wisdom of the order.

The Commission had the right to look to "the spirit and apparent theory of the law," and the District Court erred in holding that it rested its order on that alone. *Atlantic Coast Line R. R. v. Burnette*, 239 U. S. 199; *Williams v. United States Fidelity Co.*, 236 U. S. 549; *United States v. Farenholt*, 206 U. S. 226; *McDougal v. McKay*, 237 U. S. 372; *Porto Rico Ry. Co. v. Mor*, 253 U. S. 345; *Eastern Extension Tel. Co. v. United States*, 231 U. S. 326; *Interstate Drainage v. Board Commissioners*, 158 Fed. 270.

The act of Congress and the order of the Commission create no new principle unfamiliar to either carriers or passengers in transportation. *Commutation Rate Case*, 27 I. C. C. 549; *Interstate Commerce Comm. v. Baltimore & Ohio R. R. Co.*, 145 U. S. 263; *Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684; *Pennsylvania R. R. Co. v. Towers*, 245 U. S. 6; *Intermountain Rate Cases*, 234 U. S. 476, 485, 494.

The temporary nature of the order, in that it may undergo a revision after a one-year test, is in favor of the carriers rather than against them. *New England Divisions Case*, 261 U. S. 184, 201.

The order should be made effective, that the companies may try out the rates and report results to the Commission, thus to establish the facts upon which the rights of the parties shall ultimately depend. *Knoxville v. Knoxville Water Co.*, 212 U. S. 1; *Willcox v. Consolidated Gas Co.*, 212 U. S. 19; *Northern Pacific Ry. Co. v. North Dakota*, 216 U. S. 579; *Missouri Rate Cases*, 230 U. S. 474; *In re Louisville*, 231 U. S. 639; *Minnesota Rate Cases*, 230 U. S. 352; *Des Moines Gas Co. v. Des Moines*, 238 U. S. 153; *Stanislaus County v. San Joaquin Co.*, 192 U. S. 201.

The exemption of certain carriers is not arbitrary. *Wilson v. New*, 243 U. S. 332; *Stafford v. Wallace*, 258 U. S. 495.

The order does not apply to and include transportation of passengers wholly within one State.

Mr. P. J. Farrell for the Interstate Commerce Commission.

The Commission is not, as a matter of law, required to report the minor facts upon which its conclusions of fact are based. *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 489.

The order does not require appellees to perform services for a noncompensatory rate, or to establish and main-

tain a rate which will be unreasonable, unjustly discriminatory, or unduly preferential and prejudicial.

The order is not in conflict with the duty imposed upon the Commission by § 15a of the Interstate Commerce Act.

The Commission, clearly, would not have made the order if it had not been convinced that compliance with its terms would increase the passenger business of the appellees and other carriers to an extent sufficient to more than offset any loss in revenue which would otherwise result from a reduction in the rate of fare.

Where the evidence is such as to justify differences in opinion, the Court will not substitute its judgment for the judgment of the Commission as to an administrative matter within the Commission's jurisdiction. It will refrain from interfering until after opportunity has been afforded for a proper test. *Willcox v. Consolidated Gas Co.*, 212 U. S. 19.

The order is not invalid because it requires carriers to establish between themselves, without their consent, the relation of principal and agent and creditor and debtor. *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186.

The order is not rendered invalid because the interchangeable scrip coupon ticket provided for applies to transportation regardless of the extent to which the ticket may be used on a particular line.

The fact that certain carriers are exempted from the operation of the order does not render the order invalid. *Interstate Commerce Comm. v. Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88.

The order does not apply to the transportation of passengers wholly within one State. The Court will not presume that the Commission intended to make the order apply to matters not within its jurisdiction. *Texas v. Eastern Texas R. R. Co.*, 258 U. S. 204.

Mr. Chas. F. Choate, Jr., with whom Mr. Francis I. Gowen, Mr. Clyde Brown, Mr. Edward G. Buckland, Mr. H. A. Taylor, Mr. Henry Wolf Bickl , Mr. Parker McCollister, Mr. Frederick H. Nash and Mr. James Garfield were on the brief, for appellees.

Mr. Hoke Smith, with whom Mr. Samuel Blumberg, Mr. Arthur M. Loeb, Mr. Jerome Wilzin and Mr. Charles Fischer were on the brief, for National Council of Traveling Salesmen's Associations, appellant.

Mr. Leon B. Lamfrom, by leave of Court, filed a brief as *amicus curiae*.

Mr. Clifford Thorne and Mr. James W. Good, by leave of Court, filed a brief as *amici curiae*.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity brought by railroad companies to prevent the enforcement of an order of the Interstate Commerce Commission dated March 6, 1923, following reports of January 26 and March 6, 1923. 77 I. C. C. 200. *Ibid.* 647. The order purports to be made in pursuance of the Act of August 18, 1922, c. 280; 42 Stat. 827. This act amended § 22 of the Interstate Commerce Act by adding to what became (1), two paragraphs, viz.: (2), directing the Commission to require the railroads subject to the act, with such exemptions as the Commission holds justified, to issue interchangeable mileage or scrip coupon tickets at just and reasonable rates, in such denominations as the Commission may prescribe, with regulations as to use and prescribing whether the tickets are transferable or not transferable, and, if the latter, what identification may be required, and what baggage privileges go with such tickets; (3) making it a misdemeanor for any carrier to refuse to issue or accept such tickets

as required, or to conform to the Commission's rules, or for any person wilfully to offer for sale or carriage any such tickets contrary to such rules. After a hearing, the Commission ordered the railroads specified, being all the railroads having annual operating revenues in excess of \$1,000,000 and known as Class 1, to issue, at designated offices, a non-transferable, interchangeable, scrip coupon ticket in the denomination of \$90, which shall be sold at a reduction of 20 per cent. from the face value of the ticket.

The bill alleges that the amendment of 1922, as construed by the Commission, is contrary to the Fifth Amendment and to the commerce clause, Art. I, § 8, of the Constitution, but that, properly construed, it does not authorize the order made. The order is alleged to apply to intrastate carriage, and also to be inconsistent with § 2 of the Interstate Commerce Act, which requires like charges for like service in similar circumstances; with § 3, forbidding unreasonable preferences; with § 15a, providing for the establishing of rates for rate groups that will earn a fair return upon the aggregate value of the property used in transportation; (see *Increased Rates*, 1920, cited as *Ex parte* 74, 58 I. C. C. 220; *Reduced Rates*, 1922, 68 I. C. C. 676;) and with §§ 1 and 22, requiring the Commission to establish just and reasonable fares. These averments are developed in detail, but we do not dwell upon them, because the decision below, and our own, turn upon a different point. It is further alleged in the bill that the conclusion stated by the Commission, that the reduced rates established by it for scrip coupon tickets will be just and reasonable for that class of travel, is contrary to the specific facts found by the Commission, and is not to be taken as an independent finding of fact, but only as a conclusion or ruling reached by it upon a misinterpretation of the law. This was the view taken by the three judges who sat in the District Court. They

held that the Commission considered that the amendment of 1922 either required it to make a reduction, or at least showed a spirit and purpose that should be deferred to, and on that ground came to a result that otherwise would not have been reached. They held that, therefore, the order could not stand, considering that the amendment of 1922 like the rest of the Interstate Commerce Act called for an unbiassed opinion upon the merits of the case. They issued a perpetual injunction, and the defendants appealed. 288 Fed. 951.

We are of opinion that the interpretation of the statute in the Court below was right. There is no doubt that the bill owed its origin to a movement on the part of travelling salesmen and others to obtain interchangeable mileage or scrip coupon books at reduced rates. The bill that was passed originally fixed reduced rates, but it was amended to its present form undoubtedly because the prevailing opinion was that the rates should be determined in the usual way by the usual body. The object of the travelling salesmen was defeated in so far as Congress declined to take any step beyond authorizing the issue of scrip tickets. Coming as it did from the agitation for this form of reduced fares, the statute naturally enough carried with it more or less mirage of fulfilling the hope that gave it rise, but in fact it required a determination of what was just and reasonable exactly as in any other case arising under the Interstate Commerce Act. The original purpose of the amendment as introduced retained headway enough to require the issue of scrip, but there the purpose was stopped, and, as not infrequently happens in legislation, the matter was left otherwise where it was before. Apart from constitutional difficulties, *Lake Shore & Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684, the whole tendency of the law has been adverse to the enactment as proposed, at least unless a clear case should be made out.

The Commission in its report pointed out that the net railway operating income for the seven months ending July 31, 1922, was below the return fixed as reasonable, discarded the supposed analogy between the carload rate and the interchangeable scrip or mileage ticket, intimated that the supposed benefit that the carrier might get from the advance use of the money would be more than offset by the increased expenses, and said that the question whether the scrip ticket would stimulate travel sufficiently to meet any loss that might result must remain a matter of speculation until an experiment was made. After thus excluding the grounds upon which the order could be justified the Commission held that the obvious spirit and apparent purpose of the law required that the experiment should be tried, and on these premises declared that the rates resulting from the reduction of 20 per cent. would be "just and reasonable for this class of travel." It seems to us plain that the Commission was not prepared to make its order on independent grounds apart from the deference naturally paid to the supposed wishes of Congress. But we think that it erred in reading the wishes that originated the statute as an effective term of the statute that was passed, and therefore that the present order cannot stand.

Decree affirmed.